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Commentary

Trust Termination: Unborn, Living, and Dead Hands—Too Many Fingers in the Trust Pie

by GAIL BOREMAN BIRD*

One of the primary advantages of the trust lies in its inherent flexibility. Because the device is essentially so simple—the separation of legal title from beneficial ownership¹—it is adaptable to many circumstances and has a wide variety of uses, ranging from bankruptcy to family wealth distribution.² Indeed, the only limitations of the trust may be those of the imagination.³ Unless continuing flexibility is built into a particular trust arrangement, however, the trust may prove rigid and unresponsive to the changing needs, values, and conditions of the settlor and the peo-

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This Article was prepared to provide the California Law Revision Commission with background information for its study of this subject. The opinions, conclusions, and recommendations contained in the Article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

1. The modern trust concept had its origins in the use, whereby the owner of property would transfer it to the "use" of himself or a third person. The early history of the use is somewhat murky, but it is generally believed that the device had been fully developed by the thirteenth century. The use accomplished its "manifest destiny" when it became characterized and enforced as equitable ownership. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 232 (2d ed. 1898); see also Avery, *Role of the Lawyer as Fiduciary*, 4 PROB. LAW. 1, 21-22 (Summer 1977) (suggesting that the fiduciary relationship inherent in the modern trust device greatly antedates the use: "[T]he fiduciary relationship apparently existed in all of the antecedents of English law," including the Code of Hammurabi and Roman law).

2. Other purposes for which the trust concept is commonly employed include the making of charitable gifts, the administration of retirement and pension plans, and real estate financing. According to the Restatement, a trust may be established for any purpose, so long as not contrary to public policy. RESTATEMENT (SECOND) OF TRUSTS § 59 (1959). In California a trust may be created for any purpose for which a contract could be made. CAL. CIV. CODE § 2220 (West 1954).

3. 1 A. SCOTT, *THE LAW OF TRUSTS* § 1, at 4 (3d ed. 1967).

ple who must live with it, particularly the beneficiaries. The problem is particularly acute in the context of trusts established for wealth distribution within the family unit.

Suppose, for example, that a person, moved by the spirit of love and generosity, establishes a trust to provide for the support and education of his sole grandchild, then age three. Distributions of income are to commence at age eighteen, and the child is to receive the \$100,000 principal at age thirty. Twenty-five years later, the grandchild apparently is emotionally unstable, dependent on drugs and alcohol. Can the settlor modify the trust or perhaps revoke it entirely to prevent the corpus from falling into the hands of the improvident grandchild? Or suppose that the grandchild is not improvident, but rather is married with two children and would like to obtain some or all of the trust principal to purchase a house. Will the grandchild be able to reach some or all of the principal before reaching age thirty? Suppose that the grandchild is suffering from a serious illness, and her support and health care needs exceed the income being generated. Can the trustee invade the principal to meet these unforeseen expenses?

All of these potential problems could have been anticipated and resolved within the trust instrument itself. But suppose the settlor (or his attorney) was not so farsighted. Can anything be done now? Generally, once a trust has been established, its terms concerning the trustee's powers and duties, the identity of the beneficiaries, and the extent of the beneficial interests are fixed and final.⁴ On occasion, however, as the preceding examples illustrate, a question may arise as to the possibility of allowing a premature termination, in whole or in part, of a particular trust. The answer to this question depends upon a wide range of factors: is the settlor still alive; did he retain a power of revocation; what was his predominant intent; are there other beneficiaries; is this an emergency? Judicial attitudes, rules of construction, and the statutes of the particular jurisdiction may also play a significant role.

The purpose of this Commentary is threefold: to examine the judicial response to the question of trust termination and modification in various common factual settings, with particular emphasis on California decisional law; to describe the major statutory reforms developed in other jurisdictions; and to suggest possible modifications of current California law.

4. G. BOGERT & G. BOGERT, *THE LAW OF TRUSTS* § 145, at 518 (5th ed. 1973); 4 A. SCOTT, *supra* note 3, § 329A, at 2593.

Judicial and Legislative Response to Trust Termination

Courts confronting the trust termination issue generally consider a number of factors in determining the propriety of the requested termination or alteration. One major factor involves the status of the individual seeking the termination: is the proponent the trust settlor, the trustee, or the beneficiary? Because of the significance of this factor, the following analysis of the decisional and statutory law regarding trust termination focuses on three major categories: the right of the settlor to compel termination, the right of the trustee, and the right of the beneficiary.

The Right of the Settlor to Compel Termination

Revocation and Rescission

Once a trust exists, can the creator of the trust later change his mind, cancel the arrangement, and have the trust property returned to his ownership? The answer to this question turns in large part upon whether the trust is deemed revocable or irrevocable. Generally, the creation of a trust involves the completed transfer of equitable interests in the trust property to the beneficiaries. This completed transfer, whether donative or for consideration, cannot be undone. Therefore in most jurisdictions, a trust is deemed irrevocable unless the settlor expressly reserved a power of revocation.⁵ “[T]here is no implied reservation to the settlor of a power to revoke the trust, no matter how unfortunate the act of creating it may have proved to be.”⁶

Revocable Trusts

A few jurisdictions, including California, have statutorily altered the rule in favor of irrevocability. Under California Civil Code section 2280, a trust is deemed revocable unless made expressly irrevocable by its terms.⁷ This statute was enacted in 1931 and is applicable to trusts cre-

5. This rule in favor of irrevocability is traceable to early English common-law and is probably derived from the general law of gifts. 4 G. PALMER, *THE LAW OF RESTITUTION* § 18.7, at 31-32 (1978). “If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put upon himself, but he must lie down under his own folly.” *Id.* (quoting *Villers v. Beaumont*, 23 Eng. Rep. 342 (Ch. 1682)).

6. G. BOGERT & G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 998, at 273-74 (rev. 2d ed. 1983).

7. CAL. CIV. CODE § 2280 (West 1954). According to Professor Powell, this type of legislation represents a codification of the belief of some courts that “no well-advised person would create a trust without reserving to himself a power of revocation, and hence they were astute to imply such a power.” 4 R. POWELL, *THE LAW OF REAL PROPERTY* § 565, at 428.39 (rev. ed. 1981). This judicial attitude was more prevalent “before the days of heavy income and death taxes.” *Id.*; see also Comment, *Trusts and Trustees: Recent Developments in the*

ated after that date.⁸ Thus, in California a settlor may terminate a trust with relative ease. He can simply exercise the statutory power of revocation by a writing filed with the trustee.⁹

There is one major pitfall, however. If a trust is expressly made revocable and the trust instrument specifies how or when the power of revocation is to be exercised, the California courts generally have held that the settlor must comply with the terms of the trust in exercising that power. For example, in *Rosenauer v. Title Insurance & Trust Co.*¹⁰ the settlor established a trust containing the following provision:

The Trustor shall have the right *at any time during her lifetime* . . . to revoke this Trust in whole or in part by *an instrument in writing executed by the Trustor and delivered to the Trustee*. Furthermore, notwithstanding any other provision contained in this trust instrument, the Trustor retains and shall have the right to appoint the principal, together with any income accrued or received and undistributed, of the Trust Estate as shall remain undisposed of upon her death, which power may be exercised by the Trustor's written instrument *other than a Will* filed with the Trustee.¹¹

When the settlor died, her will was admitted to probate. The will provided: "This Will revokes the Revocable Trust Agreement . . . between myself as trustor, and Title Insurance and Trust Company, as the trustee."¹² The will also stated that "all funds are to come from my Trust Account at Title Insurance and Trust."¹³ Yet neither the will nor any other written revocation of the trust was delivered to the trustee during the lifetime of the settlor.

The executor and beneficiary under the will contended that the provisions of the will constituted an effective revocation under Civil Code section 2280. The plaintiff argued that the statute contained no require-

Tentative Trust Doctrine: Influence of Civil Code § 2280 on the California Law, 28 CALIF. L. REV. 202 (1940). Similar statutes exist in Oklahoma and Texas. OKLA. STAT. ANN. tit. 60, § 175.41 (West 1971); TEX. CIV. STAT. art. 7425b-41 (Vernon 1960). One major advantage of these statutes is the elimination of litigation involving the question as to whether a power of revocation was omitted from the trust instrument by mistake. This issue frequently arises in jurisdictions following the usual rule of presumed irrevocability. See G. BOGERT & G. BOGERT, *supra* note 6, § 998, at 277-82; 4 G. PALMER, *supra* note 5, § 18.7, at 30-37.

8. Trusts created before 1931 continue to be governed by the former California rule which, consonant with the majority rule, provided that the settlor can revoke a trust only if he originally reserved a power of revocation in the trust instrument. See *Gray v. Union Trust Co.*, 171 Cal. 637, 154 P. 306 (1915).

9. CAL. CIV. CODE § 2280 (West 1954); see *Fleishman v. Blechman*, 148 Cal. App. 2d 88, 95, 306 P.2d 548, 552 (1957) (any writing clearly manifesting the settlor's intention to revoke the trust is sufficient).

10. 30 Cal. App. 3d 300, 106 Cal. Rptr. 321 (1973).

11. *Id.* at 301-02, 106 Cal. Rptr. at 321-22 (emphasis in original).

12. *Id.* at 302, 106 Cal. Rptr. at 322.

13. *Id.*

ment that the revocation be filed with the trustee during the life of the settlor, that the statute did not exclude a will from the definition of a "writing," and therefore the filing of the will with the trustee after the death of the decedent complied with the statute.¹⁴

The appellate court rejected these arguments, stating that although "Civil Code section 2280 was undoubtedly intended to liberalize the power of revocation in California we do not believe it was intended to operate as a nullification of a trustor's plainly expressed preference for a mode of revocation."¹⁵ In reaching this conclusion, the court relied primarily on the Restatement of Trusts¹⁶ and two Massachusetts cases,¹⁷ each of which expresses the view that if the settlor reserved the power to revoke a trust only in a particular manner, he can revoke the trust only in the specified manner. Thus, if the settlor reserves the power to revoke during his lifetime, he cannot exercise the power by will.¹⁸

The court's reliance on the Restatement and Massachusetts case law is curious because these authorities, in accordance with the American majority rule, presuppose that a trust is irrevocable unless expressly made revocable and that there is no implied power of revocation. Under the majority rule, it is logical to say that if a trust provides for an exclusive or limited method of revocation, the trust instrument is necessarily controlling. The power of revocation cannot exceed that granted by the trust instrument. But, as noted earlier, the California statute governing revocability is one hundred eighty degrees from the majority rule and presumes that a trust is revocable unless expressly made irrevocable. The *Rosenauer* rule deprives a trust settlor of the benefits of Civil Code sec-

14. *Id.* at 302-03, 106 Cal. Rptr. at 322.

15. *Id.* at 304, 106 Cal. Rptr. at 323.

16. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 330(1) comment j.

17. *Leahy v. Old Colony Trust Co.*, 326 Mass. 49, 93 N.E.2d 238 (1950); *National Shawmut Bank v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1944).

18. The majority of courts that have considered this issue have reached the same conclusion. *See* Annot., 81 A.L.R.3d 959 (1977). In one case, however, the Texas court viewed the settlor's will as an effective revocation of an inter vivos trust, reasoning that the language of revocation contained in the trust was not testamentary but was intended to be effective as of the date of the will's execution. *Sanderson v. Aubrey*, 472 S.W.2d 286 (Tex. Civ. App. 1971). In *Sanderson*, the trust instrument did not specify a mode of revocation. The applicable Texas statute provided that "[e]very trust shall be revocable by the trustor during his lifetime, unless expressly made irrevocable by the terms of the instrument . . ." *Id.* at 286. The question then was whether the execution of a will containing revocatory language constituted a revocation during the trustor's lifetime. The court answered this question in the affirmative, viewing the will as having two aspects: "testamentary in part, but operative *in praesenti* in other parts." *Id.* at 288. For a discussion of this and related cases, see Note, *The Revocation of an Inter Vivos Trust by a Will—in Texas*, 24 BAYLOR L. REV. 274 (1972).

tion 2280 when the trust instrument not only provides for revocability, but also specifies a manner of revocation.

Despite this gap in logic, the court's decision in *Rosenauer* is justifiable on more pragmatic grounds. If a settlor enters into a trust arrangement with a third party trustee and limits himself to certain methods of revocation specified in the trust instrument, the trustee should be entitled to rely on the trust instrument. The *Rosenauer* decision thus provides some needed security and certainty to trustees.¹⁹

Another justification for the *Rosenauer* rule is afforded in the case of *Hibernia Bank v. Wells Fargo Bank & Union Trust Co.*²⁰ The trustor executed a written trust agreement on July 8, 1974, with Wells Fargo Bank as the trustee. The agreement provided that the trust was revocable by the settlor, but that the revocation would not be effective unless it was contained in a notarized writing and approved by the settlor's attorney. Less than one month later, the trustor attempted to revoke the trust by signing a statement to that effect in the presence of three witnesses. Shortly thereafter, the settlor was put under a conservatorship. A photocopy of the attempted revocation was sent to the trustee by the conservator. After the settlor's death on August 31, 1974, the trustee refused to deliver the trust assets to the administrator of the settlor's estate, contending that the trust had not been validly revoked because the purported revocation was neither notarized nor approved by the settlor's attorney.²¹

The appellate court agreed, relying primarily on *Rosenauer*.²² The court also specifically disapproved an earlier California case, *Fernald v. Lawster*,²³ which suggested that Civil Code section 2280 should override any trust provisions to the contrary, unless the trust is expressly irrevocable.²⁴ The court stated that the proposal in *Fernald* was dictum, unsupported by precedent and likely to have untoward consequences:

While the law might favor the free revocability of a trust in the interests of the alienability of property generally, there is no basis to conclude that such policy would be furthered by denying to a trustor the power to specify the manner of revocation. *Fernald* would in effect require a trustor to create either an irrevocable trust or one freely revo-

19. The court in *Rosenauer* also rejected the argument that the will provisions constituted the exercise of the power of appointment retained by the settlor under the trust, reasoning that the trust prohibited the exercise of the power by will. 30 Cal. App. 3d at 304-05, 106 Cal. Rptr. at 323-24.

20. 66 Cal. App. 3d 399, 136 Cal. Rptr. 60 (1977).

21. *Id.* at 402, 136 Cal. Rptr. at 62.

22. *Id.* at 403-04, 136 Cal. Rptr. at 62-63.

23. 26 Cal. App. 2d 552, 79 P.2d 742 (1938).

24. *Hibernia Bank*, 66 Cal. App. 3d at 404, 136 Cal. Rptr. at 63.

cable on written notice. It would not allow him to protect himself from the consequences of his whim, caprice, momentary indecision, or of undue influence by other persons.²⁵

As in *Rosenauer*, the court's reasoning is somewhat strange. Is a settlor more likely to be subject to whim, caprice, or undue influence upon revoking a trust than upon entering into it in the first instance? The underlying concern of the court in both *Rosenauer* and *Hibernia Bank* may have been ascertaining and safeguarding the settlor's true intent. If the settlor of a trust clearly delineates the method by which the trust can be revoked and later executes a revocation in compliance with those terms, we can be reasonably certain that the settlor intended to revoke the trust arrangement. But if the purported revocation does not comport with the terms of the trust, we cannot be certain what the settlor has in mind.²⁶ The problem, of course, is most acute when the settlor has since died and cannot testify about his true intentions.

In summary, the statutory presumption of trust revocability contained in Civil Code section 2280 has advantages over the current American majority rule. It prevents a trust settlor from becoming unwittingly trapped in a permanent and irrevocable situation.²⁷ The problems with the statute seen in *Rosenauer* and *Hibernia Bank* could be partially resolved by a slight revision of the statute:

Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor (1) by a writing other than a will filed with the trustee during the lifetime of the trustor or (2) by the trustor's compliance with any method of revocation specified in the trust instrument.

This revision would alleviate the difficulties faced by the trustee and the courts when a trustor purportedly attempts to revoke a trust by will. This revision, however, would not eliminate the problem of undue influence on the trustor alluded to by the court in *Hibernia Bank*. But a revocation shown to be the product of fraud, duress, or undue influence can be set aside regardless of the method employed.²⁸ The proposed revi-

25. *Id.* at 404, 136 Cal. Rptr. at 60.

26. Professor Powell notes that some courts are "extremely strict" in requiring exact compliance with the terms of a power of revocation, and suggests that "[s]uch formalism is justifiable only to the extent that it assures clarity in an act which operates to change the rights of parties." 4 R. POWELL, *supra* note 7, ¶ 565, at 428.40(1).

27. The impetus behind the 1931 amendment to Civil Code section 2280 was that "many trustors were not aware that they were creating irrevocable trusts and were unable to revoke them when their circumstances became such that they needed the trust corpus themselves." Comment, *supra* note 7, at 208. The situation was made particularly acute by the Great Depression. *Id.*

28. See 4 G. PALMER, *supra* note 5, § 20.5, at 202.

sion would also eliminate the current dichotomy between the existing statutory and case law.

Irrevocable Trusts

If a trust is deemed irrevocable, premature termination of the trust by the settlor is more problematic.²⁹ Under what circumstances can the settlor compel termination? One possible solution is to obtain the consent of all beneficiaries to an early termination of the trust.³⁰ Another avenue open to the settlor is to attempt to have the trust voided on the grounds of fraud, undue influence, or lack of capacity. These are well established grounds for the rescission of a trust, or indeed, any gratuitous transfer of property, and the law governing the rescission of inter vivos transfers generally is applicable to declarations of trust and transfers in trust.³¹

For example, when the settlor's signature to a deed of trust was obtained by misrepresentation, rescission of the transaction was granted by the court.³² Similarly, the California Supreme Court upheld the cancellation of a trust when the declaration of trust was executed while the settlor was "in an extremely agitated and nervous condition" and through the exercise of undue influence.³³

A related ground for seeking termination of a trust involves mistake. A settlor is entitled to rescind a trust that was created as a result of a material mistake.³⁴ It is not necessary that the mistake be mutual; it may be the unilateral mistake of the settlor, assuming that there was no con-

29. In California the settlor must expressly make the trust irrevocable. *See supra* text accompanying note 7. In states following the majority rule, irrevocability is presumed absent an express reservation of power to revoke. *See supra* text accompanying note 5.

30. This solution and its attendant problems are explored *infra* notes 161-211 & accompanying text.

31. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 333; Report of Committee on Modification, Revocation and Termination of Trusts, *Early Termination of Trusts*, 2 REAL PROP. PROB. & TR. 303 (1967). In the event that a trust is established for consideration, failure of consideration may also constitute grounds for rescission. *Hower v. Woman's Home Missionary Soc'y*, 4 Cal. App. 2d 719, 723, 41 P.2d 583, 585 (1935); RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 333 comment g. *But see* Comment, *Trusts: Rescission of Conveyance for Failure of Consideration*, 6 CALIF. L. REV. 309 (1918) (suggesting that if the failure of consideration involves a breach of trust, the remedy should be enforcement of the trust, not rescission).

32. *Schaper v. Schaper*, 84 Ill. 603 (1877).

33. *See, e.g., Weakley v. Melton*, 189 Cal. 44, 49-51, 207 P. 523, 526 (1922); *see also* RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 333 comment c. *But see* *Hutchins v. Security Trust*, 208 Cal. 463, 475, 281 P. 1026, 1031 (1929) (accepting the "fruits" of the trust ratifies its terms; no rescission based on claim of undue influence and coercion).

34. *See* RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 333 comment e.

sideration for the trust.³⁵ The most commonly claimed "mistakes" include the assertion that a power of revocation was mistakenly omitted from the trust, or that the settlor mistakenly believed that he had such a power.³⁶

According to the Restatement of Trusts, such a mistake is grounds for the reformation or revocation of the trust.³⁷ The mistake, however, cannot be proved merely by the subsequent statement or testimony of the settlor about his beliefs or state of mind at the time of the creation of the trust; corroborating evidence is necessary.³⁸ Thus, the essential problem is one of proof. But as Professor Palmer has noted, the courts frequently consider a variety of circumstances in such cases, including the improvidence of the trust and the hardship on the settlor. These factors, when coupled with the statements of the settlor, may well provide a basis for equitable relief.³⁹ Professor Palmer has suggested that the willingness of the courts to grant rescission on the ground of "mistake" can mitigate the harsh majority rule that a trust is deemed irrevocable unless expressly made revocable. He also criticized the evidentiary requirements imposed by the Restatement, pointing out that "[t]he finality attached to inter vivos trusts rests on uncertain ground at best, and it is unwise to reinforce a rule of doubtful validity by the stringent evidentiary requirements of the *Restatement*."⁴⁰

Because California has departed from the majority rule regarding the irrevocability of inter vivos trusts, the issues and problems raised in other jurisdictions concerning the settlor's mistaken beliefs as to revocability are not generally the subject of litigation here. This factor is a significant advantage of the present California rule and militates against the wholesale adoption of the majority rule in California.

Modification

Suppose that after creating a trust, the settlor wishes to modify one or more of its terms. May he do so? The law pertaining to the modification of a trust by the settlor is closely analogous to the rules regarding

35. Wright, *Termination of Trusts in Pennsylvania—Some Current Trends*, 115 U. PA. L. REV. 917, 929-30 (1967).

36. Annot., 59 A.L.R.2d 1229, 1231 (1958); see 4 G. PALMER, *supra* note 5, § 18.7, at 31.

37. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 332(1).

38. *Id.* comment c.

39. G. PALMER, *supra* note 5, § 18.7, at 33.

40. *Id.* at 36. Professor Palmer ultimately concludes that the doctrine of mistake does not provide a truly satisfactory solution to the sad problems raised in many of the so-called mistake cases and suggests that "it would be well to accept improvidence as a basis for rescission." *Id.* at 37.

termination. If the settlor has retained a power to modify either administrative or distributive provisions, or both, he can make whatever modifications are within the scope of that power.⁴¹ Under the majority American view, however, if the settlor has failed to reserve a power of modification, he has no right to change either administrative or dispositive provisions.⁴² The underlying rationale for the majority rule is that in creating the trust, the settlor has made a transfer of particular property interests, and he cannot later change the size or incidents of those property interests unless he has retained the power to do so in the trust instrument.⁴³ The majority rule respecting modification thus presupposes the irrevocability of the trust.

In California, by contrast, a trust is deemed revocable unless made irrevocable and therefore, in the absence of express irrevocability, should be readily modifiable by the settlor. The power to revoke is generally deemed to include the power to modify or amend.⁴⁴ The rationale is that if the trustor can terminate the trust by exercising the power of revocation and then create a new trust on the desired terms, he should be able to accomplish the desired result in one step by the amendment or modification of the original trust.⁴⁵

If the trust is irrevocable, and the settlor has not retained a power to modify or amend, modification may still be possible, either by proof of mistake⁴⁶ or by obtaining the consent of all beneficiaries.⁴⁷ When there has been a mistake in expressing the terms of an inter vivos trust, the settlor may obtain reformation of the trust instrument.⁴⁸ The mistake may be the unintentional omission of a power of modification,⁴⁹ an error

41. G. BOGERT & G. BOGERT, *supra* note 6, § 993, at 230-42; RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 331(1). Note that a broad power of modification may be tantamount to a power of revocation because the settlor could simply modify the trust to the point of revocation. G. BOGERT & G. BOGERT, *supra* note 6, § 993, at 237; *see also* Heifetz v. Bank of Am. Nat'l Trust & Sav. Ass'n, 147 Cal. App. 2d 776, 305 P.2d 979 (1957) (holding that an irrevocable trust may be terminated by the process of eliminating beneficiaries under a power to amend until there are only beneficiaries who are sui juris and consent to the termination).

42. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 331(2).

43. G. BOGERT & G. BOGERT, *supra* note 6, § 992, at 218-22.

44. *See, e.g.*, Heifetz v. Bank of Am. Nat'l Trust & Sav. Ass'n, 147 Cal. App. 2d 776, 777, 305 P.2d 979, 980 (1957).

45. G. BOGERT & G. BOGERT, *supra* note 6, § 1001, at 331-32; RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 331 comment g; Note, *Trusts: Power to Revoke in Part as Including Power to Terminate*, 45 CALIF. L. REV. 556, 557 (1957).

46. 4 G. PALMER, *supra* note 5, § 18.7, at 43.

47. For a discussion of the problems involved in obtaining the consent of all beneficiaries, *see infra* notes 161-211 & accompanying text.

48. 4 G. PALMER, *supra* note 5, § 18.7, at 43.

49. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 332(2).

in the description of trust property or beneficiaries,⁵⁰ or even a mistake as to the legal effect of the trust, particularly tax consequences.⁵¹

Another way for the settlor of an irrevocable and nonmodifiable trust to achieve a modification of the trust terms is by obtaining the consent of all beneficiaries. If all the beneficiaries are sui juris and consent to the proposed alteration, they should be estopped from later asserting that the amendment or modification was not effective.⁵² The problem with this approach is that the beneficiaries may be recalcitrant, or may not be competent, or indeed may not all be living. These problems are explored below.⁵³

Termination or Modification by the Trustee

Generally, a trustee has no power to modify or terminate a trust unless the trust instrument or statute expressly confers such a power.⁵⁴ But certain discretionary powers that are frequently conferred upon trustees, particularly the power to invade the corpus, may be tantamount to a power of termination.⁵⁵

For example, if the trustee has discretion to pay to, or to apply the trust principal for the benefit of, a particular beneficiary, the exercise of this discretionary power ultimately could result in the termination of the trust through exhaustion of the res. The underlying issue in such a situa-

50. See *Sawtelle Trust*, 12 Pa. Fiduc. 665 (Philadelphia Orphans' Ct. 1962). See generally Wright, *supra* note 35, at 930-31.

51. 4 G. PALMER, *supra* note 5, § 18.7, at 37.

The latter type of mistake is illustrated in *Flitcroft v. Commissioner*, 328 F.2d 449 (9th Cir. 1964). In *Flitcroft*, the settlor attempted to establish "Clifford trusts" for the benefit of his children. The trusts, if irrevocable, would free the settlor from tax liability on the income generated by the trust property during the ten-year term of the trusts. The settlor, however, apparently was unaware that under California Civil Code § 2280 a voluntary trust is revocable unless expressly made irrevocable; the settlor failed to provide expressly for irrevocability. When the error was discovered, the settlor sought and obtained a state court decree reforming the trusts to provide that they were irrevocable from the date of creation. Fortunately for the settlor, the Ninth Circuit Court of Appeals treated the reformed trusts as irrevocable from the date of creation and therefore the settlor achieved the desired tax benefits. *Id.* at 459-60. The Ninth Circuit noted that the mistake involved was not really one of tax law, but rather one of California trust law. *Id.* at 456.

Whether a court would grant reformation when the only mistake concerned the terms of the trust in order to obtain the tax advantage is an open question. 4 G. PALMER, *supra* note 5, § 18.7, at 43. Professor Palmer points out that a state court would likely allow reformation, but the effect of the reformation decree on the tax claim would be a federal question. *Id.*

52. G. BOGERT & G. BOGERT, *supra* note 6, § 992, at 223.

53. See *infra* notes 161-211 & accompanying text.

54. See G. BOGERT & G. BOGERT, *supra* note 6, § 992, at 228.

55. See *Boyden v. Stevens*, 285 Mass. 176, 188 N.E. 741 (1934); 4 A. SCOTT, *supra* note 3, § 334.1, at 2647-48.

tion concerns the limitations placed upon the trustee's discretion. These limitations may be imposed by the trust instrument; the instrument may provide that the discretionary power is exercisable only under a certain set of defined circumstances. Usually, though, such discretionary powers are conferred to ensure the flexibility to adapt the trust to changing circumstances, and therefore such grants of discretionary power are frequently quite broad.

What then are the controls upon the trustee exercising such a broad discretionary power to achieve termination of a trust? The answer, simply, is that he must not abuse his discretion.⁵⁶ This standard is generally held to mean that the trustee must act in good faith, from proper motives, and within the bounds of reasonable judgment:⁵⁷

[A]lthough there is a field, often a wide field, within which the trustee may determine whether to act or not and when and how to act, yet beyond that field the court will control him. How wide that field is depends upon the terms of the trust, the nature of the power, and all the circumstances.⁵⁸

How wide is the field when the trustee is simply given the power to invade the corpus for the benefit of the income beneficiary? This question was raised in the leading case of *Kemp v. Paterson*⁵⁹ and answered narrowly by the New York court.

In *Kemp*, the settlor established a trust which provided that after the

56. The Restatement provides that where "discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 187.

57. 3 A. SCOTT, *supra* note 3, § 187, at 1501. When the trustee is given "absolute" or "unlimited" discretion by the express terms of the trust instrument, Professor Scott and the Restatement would dispense with the requirement of reasonableness:

In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act.

RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 187 comment j; *see also* 3 A. SCOTT, *supra* note 3, § 187.2, at 1513-18. In contrast, Professor Halbach argues that it is likely that courts will continue to apply a standard of reasonableness to the exercise of a discretionary power, even when such power is absolute. Halbach, *Problems of Discretion in Discretionary Trusts*, 61 COLUM. L. REV. 1425, 1431 (1961). Professors Dukeminier and Johanson take a middle ground on this question, finding that "[i]n the final analysis it appears that the difference between simple discretion and 'absolute' discretion is one of degree and that the trustee's action must not only be in good faith but to some extent reasonable, with more elasticity in the concept of reasonableness the greater the discretion given." J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 538 (3d ed. 1984). The latter approach appears to be the most sensible and pragmatic.

58. 3 A. SCOTT, *supra* note 3, § 187, at 1501.

59. 6 N.Y.2d 40, 159 N.E.2d 661, 188 N.Y.S.2d 161 (1959).

settlor's death, the trustees were to pay the settlor's daughter "all of the net income annually during the rest of her life and so much of the principal sums of the trust from time to time as the Trustees may deem for [her] best interest." Upon the death of the daughter, the trustees were to transfer the corpus to the daughter's issue then living, and if there were none, then to certain other individuals.⁶⁰ The daughter did not need the principal for her support, but she was a British subject and the trust income was subject to a 92 1/2% tax; moreover, at her death the trust principal would be subject to heavy British estate taxes.⁶¹

To minimize the impact of these taxes, the trustees, with the consent of the income beneficiary, sought to terminate the trust by the exercise of their discretionary power to pay the principal to the daughter. The court concluded that the trustees were acting honestly and in good faith.⁶² Nevertheless, the majority held that the trust provision authorizing the trustee to invade principal for the best interest of the income beneficiary did not empower the trustees to turn over the entire corpus to the daughter under the existing circumstances. In the court's view, "the power to use the principal of the trust may not be enlarged into a power to terminate it."⁶³

The reasoning of the majority opinion appears specious. The trustees unquestionably had the power to terminate the trust by the invasion of the corpus. If the income beneficiary had been in serious financial straits, with mounting medical bills, it is unlikely that the court would have objected to the total invasion of the corpus and the ensuing termination of the trust. The fundamental question involves the limitation upon the exercise of the power. Because the decision of the trustees to terminate the trust was made in good faith, from the proper motives, and met the standard of "reasonableness," the restrictions on the exercise of the power must be gleaned from the terms of the trust itself. The only limitation that the settlor in *Kemp* placed upon the power was that it be used for the "best interest" of the income beneficiary.

The question then becomes one of interpretation: What did the settlor mean by the phrase "best interest"? The term "best interest" implies a very flexible standard, embracing whatever objectives the trustees deem appropriate.⁶⁴ Indeed, the lower court opinion, approved and relied

60. *Id.* at 43, 159 N.E.2d at 662, 188 N.Y.S.2d at 162 (quoting trust instrument).

61. *Id.* at 45, 159 N.E.2d at 663, 188 N.Y.S.2d at 164 (Dye, J., dissenting).

62. *Id.*

63. *Id.* at 44, 159 N.E.2d at 662, 188 N.Y.S. 2d at 163.

64. Note, *Trusts—Power to Distribute from Corpus Does Not Entail Power to Terminate Trust*, 34 ST. JOHN'S L. REV. 173, 175 (1959); see also Fleming, "Best Interests" as a Standard for Trustee Action, 46 ILL. B.J. 765 (1958) ("best interests" as a broad standard).

upon by the majority in *Kemp*, admitted that the proposed transfer would "in a sense . . . serve the beneficiary's 'best interest,'" but the court apparently was more concerned about the interests of the remaindermen.⁶⁵

The court's concern for the remaindermen seems inapposite because, if the trust instrument authorizes the invasion of corpus for the benefit of the income beneficiary, the remaindermen have the right only to whatever principal remains at the death of the life beneficiary.⁶⁶ "The rights of remaindermen are subordinate to the primary purpose of the trust"⁶⁷ Moreover, as the dissent pointed out, if the trust was not terminated the income beneficiary would be deprived of nearly all income, and the remaindermen ultimately would receive less than one-third of the trust corpus.⁶⁸ If, however, the trust were terminated, the income would be taxed at a much lower rate and the corpus would become available to the remaindermen without deduction for tax.⁶⁹ "Obviously such a plan would not be detrimental to the beneficiary."⁷⁰ The effect of the majority opinion is to deprive the trustees of their discretion, thereby removing the flexibility that the settlor had built into the trust instrument. The result runs counter to the expressed intent of the settlor. The decision in *Kemp v. Patterson* should be viewed as a warning to draftsmen that the use of general phrases such as "best interest" may be interpreted rigidly or narrowly by the courts to the detriment of the settlor's ultimate objectives and that the powers of the trustee should be expressed in clear and unequivocal language.⁷¹

In addition to discretionary powers of invasion, trustees frequently are given the power to terminate the trust when the corpus falls below a certain dollar amount. Even if the trust instrument does not contain such a provision, California statutes authorize the trustee to petition the court for termination when the fair market value of the principal is so low that the costs and burdens of administration outweigh any benefits to be gained from continuance of the trust.⁷² In such an event, the trust prop-

65. *Kemp*, 6 N.Y.2d at 46, 159 N.E.2d at 663, 188 N.Y.S.2d at 164-65 (Dye, J., dissenting) (quoting trial court).

66. Note, *supra* note 64, at 175.

67. *Id.*

68. *Kemp*, 6 N.Y.2d at 45, 159 N.E.2d at 663, 188 N.Y.S.2d at 164 (Dye, J., dissenting).

69. *Id.*

70. *Id.*

71. See Note, *Trusts—Power to Terminate—"Best Interest" of Beneficiary*, 26 BROOKLYN L. REV. 156, 157-60 (1959).

72. CAL. CIV. CODE § 2279.1 (West Supp. 1984); CAL. PROB. CODE §§ 1120.6, 1138.1 (West 1981). These statutes are applicable even if the trust is spendthrift or contains other protective provisions. *Id.* See generally 60 CAL. JUR. 3D *Trusts* § 245 (1980).

erty will be distributed to the beneficiaries in a manner conforming as closely as possible to the settlor's intent.⁷³

Right of the Beneficiaries to Compel Termination

Suppose that for one reason or another, a trust beneficiary desires to remove himself from the constraints of the trust and to achieve outright ownership of the trust property. Under what circumstances can the trust beneficiary compel termination of the trust to attain this result? Generally, if all the beneficiaries are sui juris and agree to the termination, courts permit the termination of the trust unless a material purpose of the settlor would thereby be defeated.⁷⁴ Thus, a trust beneficiary must overcome two major hurdles to achieve termination: (1) the material purpose doctrine, and (2) the requirement that all the beneficiaries consent.⁷⁵

Material Purpose Doctrine

Under the current American majority rule, a beneficiary who seeks an early termination of a trust must show that either the settlor's purpose has been accomplished or it is impossible of accomplishment.⁷⁶ This rule was developed in this country in the late nineteenth century⁷⁷ and runs sharply counter to the attitude taken by English courts to trust termination. The English view emphasizes the equitable ownership rights of the beneficiary; if all the beneficiaries are sui juris, they may compel the termination regardless of the intention or purposes of the settlor.⁷⁸ Thus, although the intention of the settlor governs the extent of the beneficial

73. CAL. CIV. CODE § 2279.1 (West Supp. 1984); CAL. PROB. CODE §§ 1120.6 (West 1981). See generally *Procedures for Terminating Small Trusts*, 19 REAL PROP. PROB. & TR. 988 (1984).

74. 4 A. SCOTT, *supra* note 3, § 337, at 2655; RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 337; see, e.g., *Moor v. Vawter*, 84 Cal. App. 678, 683-84, 258 P. 622, 624 (1927).

75. If the settlor is still alive and consents to the termination, the material purpose doctrine will not be a barrier to termination, but the problem of obtaining the consent of all beneficiaries may remain. See 4 A. SCOTT, *supra* note 3, § 338, at 2687-88.

76. 4 R. POWELL, *supra* note 7, ¶ 567, at 428.50. It has been suggested that there is really no American "minority" view on this point, and that the few American cases that have allowed termination seemingly in contravention of the rule "appear to have overlooked rather than . . . rejected it." Comment, *Trusts—Termination by Consent of Beneficiaries—Who are Beneficiaries—Acceleration of Equitable Remainders*, 37 MICH. L. REV. 941, 942 n.5 (1939).

77. 4 A. SCOTT, *supra* note 3, § 337.1, at 2662-63.

78. 4 R. POWELL, *supra* note 7, ¶ 567, at 428.49. The English rule was followed in some early American decisions, and has been adopted in Pennsylvania and Virginia. *Id.*; see 4 A. SCOTT, § 337.1, *supra* note 3, at 2662-63.

interests, it does not limit the control of such interests.⁷⁹ Underlying the English rule is a policy favoring free alienability and control of property by the living.⁸⁰

The American rule, by contrast, places great weight on the intention and goals of the settlor and hence will not permit termination of a trust, even when all the beneficiaries are sui juris and consent, if the termination would defeat a material purpose of the settlor.⁸¹ One major problem in the application of the American rule involves discerning the material purposes of the settlor and then determining whether premature termination would thwart those purposes. Because these questions are essentially factual, the cases are not wholly consistent. Nevertheless, some patterns are discernable. The presence or absence of certain factors plays a major role in predicting whether termination will be permitted under the American standard.

For the purpose of analysis, the cases may be conveniently grouped into the following four categories: trusts involving the postponement of enjoyment to a certain age; trusts involving successive beneficiaries; spendthrift trusts; and exigent circumstances justifying the modification

79. 4 A. SCOTT, *supra* note 3, § 337, at 2655. The divergent attitudes of the English and American courts are also seen in the area of spendthrift trusts. English courts have refused to recognize the doctrine, reasoning that a settlor cannot make the beneficial interests inalienable by the equitable owners, while the great majority of American courts have allowed restraints on the alienation of equitable interests. *Id.* at 2656; see G. BOGERT & G. BOGERT, *supra* note 6, § 1008, at 412-13, 420-37; Evans, *The Termination of Trusts*, 37 YALE L.J. 1070 (1928); Note, *Trusts: Termination: Power of Equity Court to Terminate Trust on Application of Beneficiary*, 34 CALIF. L. REV. 453 (1946).

80. 4 R. POWELL, *supra* note 7, ¶ 567, at 428.49. The leading English case is *Saunders v. Vautier*, 49 Eng. Rep. 282, (1841). In *Saunders*, the trust terms provided that the beneficiary was to receive the trust corpus at age 25. The court, however, granted his application for full payment at age 21. The court in *Saunders* gave little reasoning in support of its position: "the point seems . . . to have been rather assumed than decided." *Wharton v. Masterman*, 1895 A.C. 186, 193. But subsequent cases following the *Saunders* rule reasoned that once the property interests are vested in the beneficiary, he is the sole owner, and such restrictions are inconsistent with or repugnant to the property rights granted. *Gosling v. Gosling*, 70 Eng. Rep. 423, 426 (V.C. 1859); G. BOGERT & G. BOGERT, *supra* note 6, § 1008, at 412-13. It has been suggested that the "reasons" given by the English courts in support of the *Saunders* rule are not so much reasons as mere reiterations of the rule and that the real problem is not one of legal logic or reasoning, but one of public policy: "to what extent a testator or donor inter vivos should be allowed to control not only the disposition, but also the enjoyment of his property." 26 NOTRE DAME LAW. 158, 161 (1950).

81. The guiding principle at the base of both the English rule and the American rule is the same: to allow a property owner to make free use of his property so long as no public policy is violated. The major distinction, then, is who the courts perceive as the "owner": the creator of the trust or the beneficiary. There is no purely logical answer to this conundrum. See Note, *Post-Mortem Control of Property Through the Trust Device*, 18 U. CIN. L. REV. 197, 199 (1949).

of a trust. Needless to say, these analytical categories are artificial constructs, and many cases fall into more than one category.

Postponement of Enjoyment

If a trust has been established for the benefit of a single beneficiary with the provision that the principal is to be distributed to the beneficiary upon his attainment of a certain age, it is extremely unlikely that the beneficiary will be able to achieve termination of the trust prior to reaching the specified age. This conclusion is mandated by the doctrine derived from the leading case of *Clafin v. Clafin*,⁸² decided by the Massachusetts court in 1889.

In *Clafin*, the settlor established a testamentary trust for one of his sons. The terms of the trust provided that \$10,000 of the corpus would be paid to the son at age twenty-one, another \$10,000 at age twenty-five, and the remaining principal balance at age thirty.⁸³ After reaching age twenty-one, the son sought to compel the trustees to pay him the entire balance of the trust fund, relying on the English rule⁸⁴ that trust provisions postponing the payment of money beyond the age of majority are void.⁸⁵ The court rejected the beneficiary's argument, reasoning that the trust was not dry, its purposes had not been accomplished, and the intention of the settlor should be carried out.⁸⁶

The court recognized that the beneficiary's interest was not subject to any spendthrift provision, but stated that merely because the settlor had not imposed all possible restrictions, it did not follow that "the restrictions which he had imposed should not be carried into effect."⁸⁷ The court concluded that the restrictions placed upon the plaintiff's possession and control of the property were not altogether useless because they ensured that the beneficiary could not spend the property all at once.⁸⁸

82. 149 Mass. 19, 20 N.E. 454 (1889).

83. *Id.* at 20, 20 N.E. at 455.

84. See *supra* notes 78-80 & accompanying text.

85. *Clafin*, 149 Mass. at 21, 20 N.E. at 455.

86. *Id.* at 23, 20 N.E. at 456.

In the case at bar nothing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. . . . [W]e are unable to see that the directions of the testator . . . are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect.

Id.

87. *Id.*

88. It cannot be said that these restrictions [placed] upon the plaintiff's possession and control of the property are not altogether useless, for there is not the same dan-

The *Claffin* decision has been widely followed in the United States and represents the American majority rule.⁸⁹ Courts upholding the *Claffin* doctrine place great emphasis on the intention of the settlor and on their duty to recognize and carry out that intent, even though such action may thwart the desires and needs of the beneficiaries. This judicial attitude is illustrated by the California Supreme Court's decision in *Moxley v. Title Insurance & Trust Co.*,⁹⁰ which rigorously applied the *Claffin* doctrine. In *Moxley*, the beneficiary was to receive the trust corpus and any accumulated income at age thirty-five. The trust had been established by the beneficiary's mother when the beneficiary was fifteen years old. At the time of the termination action, the beneficiary was twenty-six years old, happily married, and living with her husband. She sought termination in order to use the trust principal for the purchase of a house.⁹¹ The beneficiary sought to avoid the operation of the *Claffin* doctrine on the grounds of changed circumstances and accomplishment of trust purposes.⁹² She also pointed out that the trust was not spendthrift.⁹³ The court rejected the beneficiary's arguments: "In substance, plaintiff's pleading of 'changed conditions' amounts to no more than the pleading of mere considerations of convenience to herself as a ground for frustration of the testamentary design for administration of the trust, and she cannot prevail."⁹⁴

In the court's view, the absence of spendthrift features should not

ger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.

Id.

89. 4 A. SCOTT, *supra* note 3, § 337.3, at 2668-70.

90. 27 Cal. 2d 457, 165 P.2d 15 (1946); see Note, *supra* note 79, at 453; 15 FORDHAM L. REV. 303 (1946).

91. *Moxley*, 27 Cal. 2d at 461, 165 P.2d at 17.

92. When the settlor executed her will, she was separated from her husband and wanted to provide for the security of her teenage daughter who lived with her. There was then the possibility that this trust would be the daughter's sole financial security because the father might remarry and leave his property to other individuals. The father died some years after the mother, however, and left his property to his daughter under a trust, making it unnecessary for her to depend solely on the mother's trust for future security. *Id.* at 476, 165 P.2d at 25 (Traynor, J., dissenting). The beneficiary alleged that the primary purpose of the trust was to protect her during her minority by providing for her support and education and that this trust purpose had been accomplished. She further argued that because of her father's death, she was "unable to have comforts and necessities and to buy a home as she could if her father were alive . . . and said situation was not contemplated by [the settlor] and therefore no provision was made for the same." *Id.* at 461, 165 P.2d at 17.

93. *Id.* at 461, 165 P.2d at 17.

94. *Id.* at 465, 165 P.2d at 19. The court conceded that changed circumstances may, under certain conditions, warrant a modification of a trust in order to accomplish the "real intent" of the settlor, but concluded that such circumstances did not exist here. *Id.* at 466-67, 165 P.2d at 20. The court also recognized that a "dry" or "passive" trust may be terminated

change this result; the settlor "may have had good reason for desiring that the corpus of the trust should not go to plaintiff until she should attain the specified age."⁹⁵ Furthermore, the court should "discourage wastage, by refusing the decree of termination, in the hope that the cestui will not think of alienation, or will find it too costly to use, or will be unable to find a buyer for his interest."⁹⁶

In his dissenting opinion, Justice Traynor did not directly attack the *Clafin* doctrine, but rather emphasized that the *Clafin* doctrine does not preclude termination of a trust on equitable grounds:

In this state . . . a court of equity has inherent power to terminate a trust before the end of the period specified in the trust instrument. The beneficiaries of a trust other than a spendthrift trust may secure its termination if all the beneficiaries are *sui juris* and all agree upon its termination, and if a court of equity concludes that the best interests of the beneficiaries will be served thereby.⁹⁷

The dissent concluded that the beneficiary had presented equitable grounds for termination of the trust sufficient at least to allow her to go to trial.⁹⁸

Clafin and its progeny have been sharply criticized over the years. Professor Gray was as hostile to the *Clafin* doctrine as he was to the spendthrift trust doctrine, viewing both as reflective of a pernicious paternalism:

The law has fixed the age of responsibility at twenty-one; if that is too young, let the law be changed, but the wisdom of allowing individuals to change it at their pleasure is not clear. And, if paternalism is to be introduced into our law, its introduction in this particular class of cases seems to be without the advantages that may exist elsewhere, and to retain only its irritating and demoralizing features.⁹⁹

The doctrine also runs counter to the policy favoring free alienability.¹⁰⁰ Although in the absence of a spendthrift clause the beneficiary is

prior to the time fixed by the trust instrument, but indicated that the instant trust was active and hence beyond the ambit of that rule. *Id.* at 465-67, 165 P.2d at 19-20.

95. *Id.* at 463, 165 P.2d at 18.

96. *Id.* at 464, 165 P.2d at 18 (quoting 4 G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* 2938-39 (1935)).

97. *Moxley*, 27 Cal. 2d at 469, 165 P.2d at 22 (Traynor, J., dissenting).

98. *Id.* at 476, 165 P.2d at 25 (Traynor, J. dissenting). Further ramifications of the dissenting opinion in *Moxley* are explored in the section of the Commentary dealing with distributive deviation. See *infra* notes 136-59 & accompanying text.

99. J. GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* § 124o (2d ed. 1895). Professor Scott reiterated this argument against the *Clafin* doctrine as follows: "The purpose of a spendthrift trust is the coddling of a person as against himself and as against third persons. The purpose of postponement of enjoyment is simply the coddling of a person against himself." Scott, *Control of Property by the Dead*, 65 U. PA. L. REV. 632, 648 (1917).

100. 4 R. POWELL, *supra* note 7, ¶ 567, at 428.51; Scott, *supra* note 99, at 649-50.

free to transfer his interest, any restrictions postponing enjoyment apply with equal force to the transferee. Thus, the transferee is in no better position to compel termination than the original beneficiary.¹⁰¹ This factor, although essential to the enforceability of the *Claflin* rule, necessarily diminishes the marketability of the beneficial interest.¹⁰²

A related criticism leveled against the doctrine is that it is impractical. If, as in *Claflin* and *Moxley*, there are no spendthrift restrictions, the beneficiary is free to alienate his or her interest to a stranger. It is obvious that the settlor could have had no intent or purpose in preserving the trust property for a stranger; furthermore, the goal of protecting the beneficiary clearly is thwarted by the sale of the beneficial interest at a severely discounted price. Thus, the *Claflin* doctrine ultimately causes the waste of beneficial interests.¹⁰³

Finally, as the dissent in *Moxley* observed, an extra-judicial termination of a trust may be achieved by an agreement between the trustee and the beneficiary, with a transfer of the trust assets to the beneficiary. To preclude the same result by court decree, as the *Claflin* doctrine does, penalizes beneficiaries when they conscientiously seek a judicially sanctioned termination or when the trustee is desirous of continuing commissions and refuses to agree to termination.¹⁰⁴

Many of the objections to the *Claflin* doctrine would be eliminated if the scope of the doctrine were limited to trusts containing spendthrift provisions. The presence of spendthrift features is a much stronger indication of a protective purpose on the part of the settlor than mere postponement of enjoyment.¹⁰⁵ Thus, California should abolish the *Claflin*

101. 4 A. SCOTT, *supra* note 3, § 337.3, at 2671-72.

102. See J. GRAY, *supra* note 99, § 124m, n.103. Property sold *in presenti*, but not to be delivered for many years, must be sold at a sacrifice, and when the seller is a person of the character for whom such restraints are supposed to be useful, the chances are that it will be sold at a very great sacrifice. In fact, the law, by sanctioning such restraints, is exposing inexperienced youth to those "catching bargains," against which the old-fashioned equity always strove to protect it. *Id.* § 124n; see G. BOGERT & G. BOGERT, *supra* note 6, § 1008, at 419; 4 R. POWELL, *supra* note 7, ¶ 567, at 428.51; Note, *Termination of Trusts*, 46 YALE L.J. 1005, 1011 (1937); 15 FORDHAM L. REV. 303, 307 (1946).

103. *Moxley*, 27 Cal. 2d at 472, 165 P.2d at 23 (Traynor, J., dissenting); G. BOGERT & G. BOGERT, *supra* note 6, § 1008, at 419.

104. 4 R. POWELL, *supra* note 7, ¶ 567, at 428.53. For a discussion of the impact of spendthrift restrictions on the *Claflin* doctrine, see *infra* notes 122-37 & accompanying text.

105. See *infra* notes 120-35 & accompanying text. It should be noted that there is one major limitation on the operation of the *Claflin* doctrine. A trust cannot remain indestructible beyond the perpetuities period. J. DUKEMINIER & S. JOHANSON, *supra* note 57, at 581; Comment, *Trusts—Duration and Indestructibility*, 24 TENN. L. REV. 1021, 1026 (1957). California Civil Code § 771 codifies this rule, providing that "[w]henever a trust has existed longer than the time within which future interests in property must vest under this title . . . [i]t shall be terminated upon the request of a majority of the beneficiaries." CAL. CIV. CODE § 771

rule except as it relates to spendthrift trusts.¹⁰⁶

Successive Beneficiaries

When a settlor has created a trust providing that the income is to be paid to one beneficiary for life, and on the death of the income beneficiary the principal is to be paid to another, the mere fact that successive interests have been created generally is not held to be evidence of any "material purpose" on the part of the settlor precluding termination prior to the death of the income beneficiary.¹⁰⁷ Thus, if the income beneficiary and the remainderman are both competent and consent to the termination, they may compel termination.¹⁰⁸ Similarly, if the income beneficiary acquires the remainder interest, or if the remainderman acquires the income interest, termination can be compelled.¹⁰⁹

If, however, in addition to successive interests, there is other evidence of a "material purpose" of the settlor that remains unfulfilled, termination will not be permitted.¹¹⁰ Such other evidence may be in the

(West 1982). Thus, if a trust has endured longer than the perpetuities period, it may be terminated regardless of whether there is a material purpose of the settlor that remains unfulfilled. For a critical analysis of the California statute, see Dukeminier, *Perpetuities Revision in California: Perpetual Trusts Permitted*, 55 CALIF. L. REV. 678, 685-90 (1967).

106. See RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 337 comment f; 4 A. SCOTT, *supra* note 3, § 337.1, at 2664. *But see* Comment, *supra* note 76, at 943-45 suggesting that this rule is not inevitable:

Though it is reasonable to infer that the settlor's purpose is only to provide for the several beneficiaries, it is just as reasonable to infer that his purpose is to deprive the life *cestui* of enjoyment of the corpus, that otherwise he would have divided the corpus and have given the parcels outright to the beneficiaries.

Id. at 945.

107. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 337 comment f; 4 A. SCOTT, *supra* note 3, § 337.1, at 2658.

108. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 337 comment f; 4 A. SCOTT, *supra* note 3, § 337.1, at 2658-60.

109. *Id.*; see, e.g., *Eakle v. Ingram*, 142 Cal. 15, 75 P. 566 (1903).

110. 4 A. SCOTT, *supra* note 3, § 337.1, at 2660-62. This rule generally holds even when termination would facilitate the settlement of a will contest. *Winn, Will Compromises Affecting Trusts*, 92 TR. & EST. 777 (1953). See generally 4 A. SCOTT, *supra* note 3, § 337.6, at 2676-82 (compromise agreements). For example, in the leading case of *Adams v. Link*, 145 Conn. 634, 145 A.2d 753 (1958), the testator's will established a testamentary trust which provided that the income was to be paid to two individuals for life, and on the death of the survivor, the principal was to be distributed to a charitable institution. The trust contained no spendthrift restrictions. The will was contested by the testator's heirs at law. A compromise was eventually struck, whereby a portion of the corpus would be paid outright to the contestants, another portion to the surviving income beneficiary, and a third portion to the charitable remainderman. The court refused to approve the compromise agreement, reasoning that the testator had two objectives that would be defeated by termination of the trust: (1) financial management of the trust corpus by trustees selected by the testator, and (2) preclusion of expenditure of the principal by the life beneficiaries. *Id.* at 639, 145 A.2d at 755-56. According to the court, the

form of spendthrift restrictions,¹¹¹ support provisions,¹¹² or even extrinsic evidence.¹¹³ For example, in *Estate of Easterday*,¹¹⁴ the income beneficiary of the trust acquired the remainder interest in one-fourth of the corpus and sought to compel termination of the trust as to that one-quarter interest. There were no spendthrift restrictions.¹¹⁵ Nevertheless, the court refused to allow termination. The testimony of the settlor's attorney indicated that the settlor had a protective intent to provide support to his son, the income beneficiary, during his life. The son was unable to support himself. The court held that such extrinsic evidence was admissible to establish the trust purposes¹¹⁶ and found that the evidence demonstrated the settlor's purpose that "his son should, for his own good, not have control of the principal, and that, in the circumstances, his purpose was a wise one."¹¹⁷ Although the trust lacked spendthrift features, the court indicated that the mere possibility the beneficiary might circumvent the settlor's purposes by selling his interest was an insufficient reason for destroying the legal interest of the settlor in creating the trust. The court added hopefully: "The life beneficiary may be unable to find a buyer"¹¹⁸

lack of spendthrift restrictions did not indicate that the settlor intended no protection at all. *Id.* at 640, 145 A.2d at 756. The principles espoused in *Adams v. Link* have a wide following. See Annot., 29 A.L.R.3d 8, 45-52 (1970). With respect to the argument that the law favors settling disputes that might otherwise result in complex and protracted litigation, a California court has responded that "the deference to such settlements gives way . . . to adherence to basic trust law." *Estate of Gilliland*, 44 Cal. App. 3d 32, 40, 118 Cal. Rptr. 447, 452 (1974).

In some jurisdictions, will contest compromise agreements are regulated by statute. For example, under Uniform Probate Code § 3-1102, the court shall approve such an agreement if it finds that the contest is in good faith and that the effect of the agreement upon persons represented by fiduciaries is just and reasonable. The statute makes no mention of the "material purpose" requirement. See generally G. BOGERT & G. BOGERT, *supra* note 6, § 1009, at 437-48 (termination by court approval of compromise proposed by parties to litigation).

111. See *infra* notes 120-35 & accompanying text.

112. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 337, comment m; 4 R. POWELL, *supra* note 7, ¶ 567, at 428.54; 4 A. SCOTT, *supra* note 3, § 337.4, at 2673-74.

113. Where the settlor's purposes are not expressed in the trust instrument, extrinsic evidence of the surrounding circumstances is admissible in order to determine the purposes of the trust. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 337 comment e. Professor Powell advises that this is "a rule fraught with danger and is to be applied most sparingly." 4 R. POWELL, *supra* note 7, ¶ 567, at 428.55.

114. 45 Cal. App. 2d 598, 114 P.2d 669 (1941).

115. The lack of a spendthrift clause was not an oversight. The settlor had told his attorney "I understand spendthrift trusts, and I don't want a spendthrift trust. I want him [the settlor's son and income beneficiary] to get the income . . . during his natural life. I want it so he can't go around and beat his creditors. I want him to live an honest, upright life." *Id.* at 603, 114 P.2d at 672.

116. *Id.* at 604, 114 P.2d at 672.

117. *Id.* at 608, 114 P.2d at 674.

118. *Id.* at 607, 114 P.2d at 674.

The major criticisms leveled against the *Claflin* doctrine are equally applicable to the *Easterday* decision.¹¹⁹ *Easterday* reflects the paternalistic attitude deplored by Gray; the holding necessarily would diminish the marketability of the beneficial interest and ultimately could result in the waste of the beneficial interest.

Spendthrift Trusts

Although the absence of a spendthrift clause is not a bar to the operation of the *Claflin* rule and other aspects of the material purpose doctrine, the mere existence of a spendthrift provision greatly strengthens the case against premature termination.¹²⁰ The typical spendthrift provision, which restrains voluntary and involuntary alienation of the beneficial interest by the beneficiary, indicates a clear intent on the part of the settlor not only to provide for the beneficiary, but also to shield him from his own improvidence.¹²¹ Although serious policy questions have been raised concerning the legality and morality of the spendthrift trust concept,¹²² the spendthrift trust has gained wide acceptance in the United States¹²³ and is recognized in California by both statute and case law.¹²⁴

In the great majority of American jurisdictions that accept the spendthrift trust doctrine, courts have held that the beneficiaries under such a trust cannot compel termination, even though all are sui juris and consent. This rule applies not only to trusts involving postponement of enjoyment, but also to trusts for successive beneficiaries.¹²⁵ For example, in *Estate of Leonardini v. Wells Fargo Bank & Union Trust Co.*,¹²⁶ both the income beneficiary and the remainderman sought a partial termination of the trust. The court refused their request, noting that:

The testator set up this trust for the life of Mrs. Leonardini and provided that the total income should be paid to her for that period. To protect her against herself, and to assure that this income should not be depleted by her acts, he made this a spendthrift trust. It certainly violates the spirit of the spendthrift [trust] provisions to permit Mrs. Leonardini . . . to consent to its diminution—the very thing the testa-

119. See *supra* notes 99-104 & accompanying text.

120. According to Professor Scott, the most common application of the material purpose doctrine involves spendthrift trust cases. 4 A. SCOTT, *supra* note 3, § 337.2, at 2664.

121. G. BOGERT & G. BOGERT, *supra* note 4, § 40, at 147.

122. See, e.g., J. GRAY, *supra* note 99, §§ 134-277; Scott, *supra* note 99, at 642-47.

123. See 2 A. SCOTT, *supra* note 3, § 152, at 1132-39.

124. CAL. CIV. CODE §§ 859, 867 (West 1982); see Note, *Trusts: Spendthrift Trusts in California: Civil Code Sections 859 and 867: Planning and Construction of Spendthrift Provisions*, 40 CALIF. L. REV. 441 (1952).

125. 4 A. SCOTT, *supra* note 3, § 337.2, at 2664.

126. 131 Cal. App. 2d 9, 280 P.2d 81 (1955).

tor tried to prevent by the spendthrift provision.¹²⁷

In certain exceptional cases the courts have departed from a strict application of this rule or have found grounds for circumventing it. For example, in *Estate of Nicely*,¹²⁸ the testator's will established a testamentary trust directing that \$250 per month be paid to the testator's daughter for life and that on her death the principal be paid to certain charities. The trust was made spendthrift and included a provision giving the trustee the power to invade the corpus in an emergency affecting the daughter. A portion of the charitable remainder gift violated former California Probate Code section 41 and normally would have passed outright to the daughter under the intestacy laws. Because of the corpus invasion power, however, neither the extent to which section 41 was violated nor how much should pass by intestacy could be determined. The trial court held that distribution of the intestate portion would therefore be delayed until the death of the daughter.¹²⁹

The appellate court sought and found a more practical result. The simplest solution would involve direct termination of the trust, but this was precluded by the spendthrift clause. The court indicated, however, that the daughter could waive the corpus invasion provision. Upon waiver, "the trust becomes nothing more than an annuity."¹³⁰ The court reasoned that although under the terms of the trust the charitable beneficiaries were not to take until the death of the life beneficiary, the deferment obviously was not for their benefit, but was only a consequence of the life estate. The court concluded that the daughter could apply to the probate court for the purchase of an annuity to pay her the \$250 per month, with the proviso that the annuity be inalienable and not subject to creditors' claims or assignment. Once this was accomplished, continuance of the trust would serve no further purpose; the trust would be "dry" and "naked" and hence terminable.¹³¹

Decisions such as *Leonardini*, refusing termination when the trust contains a valid spendthrift provision, make more sense than *Clafin* and related cases discussed previously.¹³² As Professor Powell has noted, "[t]he inalienability of the beneficiary's interest makes it inescapably

127. *Id.* at 14, 280 P.2d at 85. As an additional bar to termination, the court in *Leonardini* also found that unborn beneficiaries had an interest in the corpus. *Id.* at 17, 280 P.2d at 87. This problem is discussed *infra* notes 161-211 & accompanying text.

128. 235 Cal. App. 2d 174, 44 Cal. Rptr. 804 (1965).

129. *Id.* at 178, 44 Cal. Rptr. at 807-08.

130. *Id.* at 185, 44 Cal. Rptr. at 811.

131. *Id.* at 186, 44 Cal. Rptr. at 812. For a discussion of other exceptional circumstances, see *infra* notes 136-59 & accompanying text.

132. See *supra* notes 82-106 & accompanying text.

clear that the trust's purposes would be frustrated by an early elimination of the trust."¹³³

Furthermore, the spendthrift restraint operates not merely as strong evidence of the settlor's material protective purpose, but also as an enforcement mechanism for that purpose. Thus, unlike the situation in *Claffin* and *Easterday*, a decree denying termination in the spendthrift trust cases cannot be circumvented by a sale of the beneficial interest. In line with this reasoning, the material purpose rule, insofar as it relates to spendthrift trusts, should be kept intact as a barrier to early termination. Moreover, the limitations on termination inherent in the material purpose rule should be coextensive with the validity of the spendthrift restrictions. To the extent that voluntary or involuntary alienation is permitted despite the spendthrift restraint, termination by the beneficiary should be allowed.¹³⁴ If the trust provides for the regular payment of a specified sum to the income beneficiary for life, with a remainder over, then the annuity solution adopted by the court in *Estate of Nicely*¹³⁵ should be pursued. This type of solution would obviate the necessity of continued trust administration during the lifetime of the income beneficiary and hence would be less costly.

Exigent Circumstances Justifying Modification: Distributive Deviation

It is well established that the court has the inherent equitable power to authorize deviation from the express terms of a trust in order to effectuate the underlying purpose of the settlor.¹³⁶ The question, then, is under what circumstances and conditions the court will exercise this

133. 4 R. POWELL, *supra* note 7, ¶ 567, at 428-53.

The purpose of such a [spendthrift] trust is to prevent voluntary or involuntary alienation by the beneficiaries. To hold that it is valid means that the court will aid in effecting the object of the settlor. It would be directly frustrating his purpose if the court ended the trust and gave the principal to the beneficiaries so that they could sell and their creditors could take their interests.

G. BOGERT & G. BOGERT, *supra* note 6, § 1008, at 435-36.

134. This assumes, of course, that the other requisites for early termination are met, that is, that all beneficiaries are sui juris and consent to the termination.

135. See *supra* notes 128-31 & accompanying text. It should be noted, however, that courts are unwilling to substitute an annuity for a trust income interest without the express consent of the life beneficiary. Thus, in *Estate of Feuereisen*, 17 Cal. App. 3d 717, 95 Cal. Rptr. 165 (1971), where the trust provided that \$270 per month should be paid to the settlor's sister for life, and on her death, the trust assets were to be distributed to certain charities, the court refused to authorize the purchase of a commercial annuity and termination of the trust in the absence of the consent of the life beneficiary. *Id.* at 722, 95 Cal. Rptr. at 168. The court also indicated that "good cause" must be shown for the purchase of an annuity and that the saving of trustee's fees did not necessarily amount to good cause, particularly where the life beneficiary apparently had objections to the substitution.

136. G. BOGERT & G. BOGERT, *supra* note 6, § 994, at 242. This power is analogous to the

power. Initially, a distinction must be drawn between "administrative deviation" and "distributive deviation." Courts frequently have permitted the trustee to deviate from the administrative or management provisions of the trust when unforeseen exigencies have arisen, authorizing the trustee to sell property that otherwise would have to be retained¹³⁷ or to make investments that otherwise would be improper under the express terms of the trust.¹³⁸ Courts traditionally have been less willing to authorize deviation from the distributive provisions of a trust. Two factors, viewed previously in other contexts, provide a partial explanation for this judicial attitude: the material purpose rule and the requirement of beneficiary consent.

Under the guise of the material purpose doctrine, courts refuse to allow modification of, or deviation from, the distributive provisions of a trust if doing so would defeat a material purpose of the settlor.¹³⁹ Indeed, deviation will be permitted only when the main purpose of the trust is threatened.¹⁴⁰ If the settlor's primary purpose was to provide support for the income beneficiary, and the income being generated by the trust is insufficient to provide for basic support needs of such beneficiary, then the main purpose of the trust is being impeded. In this situation, the courts have been willing to grant relief by authorizing an invasion of corpus if this can be accomplished without impairing the interests of other beneficiaries.¹⁴¹ For example, in *Whittingham v. California Trust*

cy pres doctrine applicable to charitable trusts. *Stanton v. Wells Fargo Bank & Union Trust Co.*, 150 Cal. App. 2d 763, 770, 310 P.2d 1010, 1015 (1957).

137. See, e.g., *Adams v. Cook*, 15 Cal. 2d 352, 101 P.2d 484 (1940); cf. *Security-First Nat'l Bank v. Easter*, 136 Cal. App. 691, 29 P.2d 422 (1934) (reversing trial court order directing sale of property contrary to express terms of trust).

138. See, e.g., *Citizens Nat'l Bank v. Morgan*, 94 N.H. 284, 51 A.2d 841 (1947); *Lambertville Nat'l Bank v. Bumster*, 141 N.J. Eq. 396, 57 A.2d 525 (1948); see also, *Haskell, Justifying the Principle of Distributive Deviation in the Law of Trusts*, 18 HASTINGS L.J. 267, 270-71 (1967). In more recent years some courts have been willing to authorize such deviation when inflation has eroded the value of the trust corpus. It was thought that by freeing the trustees from certain investment constraints contained in the trust instrument, the trust corpus could be invested more productively, thereby allowing the trust to keep pace with inflation. *Frolik, Adjustment for Inflation for Fixed-Income Trust Beneficiaries*, 54 NOTRE DAME LAW. 661, 689-92 (1979). Compare *In re Trusteeship Under Agreement with Mayo*, 259 Minn. 91, 105 N.W.2d 900 (1960) (permitting investment deviation due to the adverse inflationary impact) with *Stanton v. Wells Fargo Bank & Union Trust Co.*, 150 Cal. App. 2d 763, 310 P.2d 1010 (1957) (finding that economic conditions were not grave enough to permit deviation).

139. See *supra* note 74 & accompanying text.

140. See, e.g., *Estate of Gilliland*, 44 Cal. App. 3d 32, 118 Cal. Rptr. 447 (1974). The court will authorize deviation from the terms of the trust when "'owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the . . . purposes of the trust' . . . Unusual or emergent circumstances afford the basis for deviation." *Id.* at 37, 118 Cal. Rptr. at 450 (citations omitted).

141. It has been suggested that there are four factors involved in determining whether

Co.,¹⁴² the income beneficiary was at the time of execution of the trust in good health and self-supporting. Later she became a chronic invalid, unable to earn her own living and unable to make the mortgage payments on her house, which was under threat of foreclosure. Because she was ultimately entitled to succeed to one-sixth of the trust corpus, the court authorized invasion of that portion of the corpus, reasoning that no one else had a beneficial interest in it.¹⁴³

When the financial position of the income beneficiary is less precarious, however, courts have denied deviation from the trust terms even though the interests of other beneficiaries are protected. In *Moxley v. Title Insurance & Trust Co.*,¹⁴⁴ the majority concluded that the beneficiary had not demonstrated sufficient changed circumstances or an emergency warranting deviation from the express terms of the trust: "[W]e do not believe that a trust should be modified merely upon a showing of the beneficiary's desire to purchase a home and a showing of the insufficiency of the beneficiary's income to make such a purchase"¹⁴⁵ Even when it is conceded that the settlor's main purpose is to provide support for the income beneficiary and that this purpose is threatened by the insufficiency of income, courts disallow deviation for the benefit of the income beneficiary if deviation will adversely affect the interests of other beneficiaries; "this is true even though it appears that the income beneficiary was the primary object of the settlor's bounty and that the settlor would have desired such a payment."¹⁴⁶ In *Estate of Van Deusen*,¹⁴⁷ the trust instrument provided that the trust income was to be paid in equal shares to the settlor's two daughters, and on the death of the survivor, the corpus was to be distributed to the settlor's grandchildren or their issue. The trust produced only \$200-\$250 per month in total income. The income beneficiaries petitioned the court to instruct the trustee to pay each of them \$200 per month out of income if sufficient, but if not, out of the corpus of the trust. The income beneficiaries alleged that the settlor had anticipated that the net income from the trust investments would be at least \$400 per month, intending that not less than

deviation should be allowed: (1) the severity of the income beneficiary's financial need; (2) the relationship between the income beneficiary and the settlor; (3) the existence of minor or unborn remaindermen; and (4) whether a primary purpose of the settlor included the preservation of corpus for the remaindermen. Frolik, *supra* note 138, at 676-77.

142. 214 Cal. 128, 4 P.2d 142 (1931).

143. *Id.* at 134-35, 4 P.2d at 145.

144. 27 Cal. 2d 457, 165 P.2d 15 (1945); *see supra* notes 90-98 & accompanying text.

145. *Id.* at 468, 165 P.2d at 21.

146. Halbach, *supra* note 57, at 1426.

147. 30 Cal. 2d 285, 182 P.2d 565 (1947).

\$200 per month would be available for each daughter. One beneficiary had an incurable disease needing special medical treatment, and the other was wholly dependent upon the trust income for her support. The trial court issued an order granting the beneficiaries' petition.

The California Supreme Court reversed on the grounds that the settlor's daughters had only an income interest and that the invasion of the corpus without the consent of the remaindermen constituted an impermissible taking of the latter's property.¹⁴⁸ The court stated that "[s]ympathy for the needs of the respondents [income beneficiaries] does not empower the court to deprive the residuary beneficiaries of their interests in the corpus of the trust without their consent"¹⁴⁹

The court's decision in *Van Deusen* is supported by the substantial weight of authority.¹⁵⁰ On a few occasions, however, the courts have evaded the import of this rule, either by gleaning an implied power to invade the corpus from the terms of the trust, or by liberalizing the consent requirement.¹⁵¹ In the controversial case of *Petition of Wolcott*,¹⁵² the court did both. The testator left his residuary estate in trust, directing that the income be paid to his widow for life; on her death, the principal was to be distributed to the settlor's then living issue, or in default of issue, to the settlor's heirs at law. The testator was survived by his widow, two sons, and an eighteen year old grandson. The annual income generated by the trust was approximately \$2300. The widow was eighty-two years of age, ill and infirm, and the income was insufficient to afford her adequate subsistence. The trustee sought authorization to invade principal up to the sum of \$4000 a year for the purpose of providing the widow with reasonable support. The testator's children and grandchild consented to the invasion.¹⁵³ The New Hampshire court authorized the deviation. The court first noted that "[a]lthough not expressly stated, the testator's purpose that during her life, his wife should have the beneficial use of his entire estate . . . is readily apparent."¹⁵⁴ The court recognized that the trust instrument contained no power to invade the corpus for the widow's benefit, but "[o]n the other hand, such

148. *Id.* at 293, 182 P.2d at 571.

149. *Id.* at 295, 182 P.2d at 573.

150. Haskell, *supra* note 138, at 277.

151. Halbach, *supra* note 57, at 1427.

152. 95 N.H. 23, 56 A.2d 641 (1948), noted in Note, *Trusts—Deviation from Terms of a Trust*, 28 B.U.L. REV. 387 (1948); 47 MICH. L. REV. 422 (1949).

153. The grandson was represented by a guardian ad litem, who also represented the possible interests of persons as yet unborn. *Wolcott*, 95 N.H. at 25, 56 A.2d at 642.

154. *Id.* at 25, 56 A.2d at 642.

use [was] not specifically forbidden.”¹⁵⁵ The court concluded that because the testator’s intent to support his widow was implicit in his will, the interests of the remaindermen were necessarily secondary to his, and they took subject to the execution of that intent: “The remaindermen are deprived of no rights so long as rights which the life tenant was intended to have are not exceeded.”¹⁵⁶ The court, emphasizing the living remaindermen’s consent to the modification, indicated that the interests of unborn contingent remaindermen were sufficiently represented.¹⁵⁷

The decision in *Wolcott* engendered some controversy; although Professor Scott commented favorably,¹⁵⁸ Professor Niles likened the New Hampshire court to Robin Hood and his band of merry men.¹⁵⁹ The problem inherent in cases such as *Van Deusen* and *Wolcott*, i.e., the taking of property from remaindermen for the benefit of the income beneficiary, would be greatly alleviated if the consent of all beneficiaries, particularly unborn or unascertained remaindermen, were more easily obtainable. Possible solutions to this problem are explored below.¹⁶⁰

Consent of All Beneficiaries

Even when the material purpose doctrine does not bar termination—such as when the settlor is alive and consents to an early termination of the trust¹⁶¹ or when no material purpose would be served by the

155. *Id.* at 25, 56 A.2d at 643.

156. *Id.* at 27, 56 A.2d at 644.

157. *Id.* at 27-28, 56 A.2d at 644. The latter point is open to question. The court was apparently relying on the doctrine of virtual representation. Although the interests of the unborn beneficiaries were represented by the guardian ad litem, the guardian apparently consented to the proposed modification without extracting any quid pro quo. Under the standard applied by most courts, this is not adequate representation. See *infra* notes 212-20 & accompanying text.

158. 2 A. SCOTT, *supra* note 3, § 168, at 1294-95. For other generally favorable discussions of the *Wolcott* case, see Haskell, *supra* note 138, at 277-81; Note, *Variation of Private Trusts in Response to Unforeseen Needs of Beneficiaries: Proposals for Reform*, 47 B.U.L. REV. 567, 582-88 (1967).

159. In reviewing the second edition of Scott’s treatise, Professor Niles commented: [A]lthough Professor Scott would like to have the law developed in a more liberal fashion . . . , it does not seem to this reviewer that a judge has the power to exchange his robes of black for Lincoln green, and to take from the remainderman and give to the income beneficiary. The doctrine of deviation does not justify the court in playing favorites, even though in certain cases the dead hand would probably applaud.

Niles, Book Review, 32 N.Y.U. L. REV. 886, 893 (1957) (reviewing A. SCOTT, *THE LAW OF TRUSTS* (1956)).

160. See *infra* text accompanying notes 194-263.

161. It is well established that termination will be permitted if the settlor and all beneficiaries desire it, even though the purposes of the trust have not been totally fulfilled. *Heifetz v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 147 Cal. App. 2d 776, 785, 305 P.2d 979, 985 (1957);

continuance of the trust¹⁶²—the ability of the beneficiaries to compel termination may be impeded by the further requirement that the consent of all beneficiaries be obtained.

It is essential that all living beneficiaries consent to the proposed termination.¹⁶³ Even if all the living beneficiaries are amenable to termination, however, the presence of unborn or unascertained beneficiaries whose consent cannot be obtained may preclude termination of the trust. The unborn beneficiary problem arises in two broad factual contexts: when the settlor of the trust claims to be the sole beneficiary; and when the living beneficiaries claim to be the sole beneficiaries. The following section analyzes each of these categories and explores solutions to the various problems involving unborn or unascertained beneficiaries.

Settlor as Sole Beneficiary

If the trust settlor is the sole beneficiary, he may compel termination of the trust, even though the trust is stated to be irrevocable or spendthrift.¹⁶⁴ In many cases, however, it is difficult to determine whether or not the settlor is the sole beneficiary. If the settlor establishes a trust to pay himself the income for a certain period of time, and at the end of that period, to pay the principal to him, he is clearly the sole beneficiary.¹⁶⁵ Similarly, if the settlor is the trust income beneficiary and at his death the principal is to be paid to his estate or personal representative, he is re-

RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 338(1); 4 A. SCOTT, *supra* note 3, § 338, at 2687-88. Similarly, if the settlor is himself the sole beneficiary and desires to end the trust prematurely, termination will be allowed. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 339; 4 A. SCOTT, *supra* note 3, § 339, at 2694; Note, *supra* note 103, at 1015.

162. See, e.g., Estate of Gallimore, 99 Cal. App. 2d 664, 222 P.2d 259 (1950).

163. See, e.g., Estate of Feureisen, 17 Cal. App. 3d 717, 722-23, 95 Cal. Rptr. 165, 168 (1971) (holding that the consent of the life beneficiary was necessary for termination of the trust); Estate of Gallimore, 99 Cal. App. 2d 664, 667, 222 P.2d 259, 261 (1950) (holding that the trust could not be terminated over the objections of one remainderman, even though all beneficiaries were competent adults and all other beneficiaries, including three remaindermen and the income beneficiary, consented to termination).

164. See G. BOGERT & G. BOGERT, *supra* note 6, § 1004, at 375-76; Report of Committee on Modification, Revocation and Termination of Trusts, *supra* note 31, at 304. The only jurisdiction deviating from this rule is Kentucky. 4 R. POWELL, *supra* note 7, ¶ 566, at 428.40(5). The underlying rationale for this rule is that because no one other than the settlor has any beneficial interest in the property, he should be permitted to do with it as he pleases, so long as he is not under any legal incapacity. The interest of the trustee in continuing fees is not sufficient to prevent termination of the trust. See Evans, *supra* note 79, at 1072. The major argument against the rule is that if the settlor has created a trust for his own protection, he should not be permitted later in a moment of folly to deprive himself of that protection. Professor Scott responds: "Even though in a moment of folly he has created a trust . . . there is no reason why he should not later in a moment of wisdom revoke the trust." 4 A. SCOTT, *supra* note 3, § 339, at 2699.

165. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 127 comment b.

garded as the sole beneficiary.¹⁶⁶

In contrast, if the settlor is the trust income beneficiary and at his death the principal is to be distributed to his "children," his "issue," or his "descendants," courts generally hold that the settlor is not the sole beneficiary and that an equitable remainder interest has been created in his children, issue, or descendants, whether or not the latter are in existence.¹⁶⁷

In *Levy v. Crocker-Citizens National Bank*,¹⁶⁸ the settlor executed two identical instruments, each providing that he was to receive the net income for his life; on his death the trust corpus was to be distributed pursuant to his exercise of a general testamentary power of appointment, or, in the absence of such appointment, to his then surviving issue. The trusts were irrevocable.¹⁶⁹ Six years later, the settlor sought to terminate the trusts on the ground that he should be considered the sole beneficiary. The California Court of Appeal rejected his argument, reasoning that a gift to issue indicated an intent to create an interest in a special class of persons and not to provide merely for succession by the general class of persons who would take at the settlor's death under the intestacy laws.¹⁷⁰

A more difficult constructional question is presented when the trust provides that the settlor is to receive the income during his life, and on his death the principal is to be distributed to his heirs. This problem has

166. *Woodruff v. Trust Co.*, 233 Ga. 135, 137-38, 210 S.E.2d 321, 323 (1974); RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 127 comment b; see Browder, *Trusts and the Doctrine of Estates*, 72 MICH. L. REV. 1509, 1524 (1974). If the settlor is the income beneficiary and the trust contains no provision for the distribution of principal at his death, the settlor is regarded as the sole beneficiary because the trustee will hold a resulting trust for him or his estate. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 127 comment b.

167. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 127 comment b; 2 A. SCOTT, *supra* note 3, § 127.1, at 986-87.

168. 14 Cal. App. 3d 102, 94 Cal. Rptr. 1 (1971).

169. The settlor executed the trust instruments when he was 21 years of age, apparently at his mother's insistence. He testified that he did not realize that the documents were trust instruments until his mother's death six years later. The court acknowledged that it saw no logical reason for the creation of the irrevocable trusts and that the tax consequences were severe, but indicated that the settlor's testimony, although relevant in an action to rescind the trust on the ground of mistake or undue influence, had no bearing on the question of termination, *i.e.*, whether he intended to make a gift to anyone. *Id.* at 104-05, 94 Cal. Rptr. at 2-3.

170. *Id.* at 105-06, 94 Cal. Rptr. at 3-4. The settlor further argued that because he had a will, it was unlikely that he would die intestate and hence there was little likelihood that anyone would take in default of the exercise of the power of appointment. The existence of the power indicated an intent to not make a gift to those who would take in default of the exercise of the power. The court indicated that it was constrained by precedent to reject this argument. *Id.* at 107, 94 Cal. Rptr. at 4.

arisen in several California cases over the years, but there is currently no satisfactory resolution.

In *Gray v. Union Trust Co.*,¹⁷¹ the settlor executed an irrevocable trust instrument which provided that she was to receive the net income during her life and upon her death the trust property was to be distributed "as she shall provide in her last will and testament, and leaving no last will and testament, said property shall go to and vest in her heirs at law, according to the laws of succession of the state of California as such laws now exist."¹⁷² The settlor was unmarried and had no children or other lineal descendants. The trial court, agreeing with the settlor that she was the only person having any interest in the trust property, granted her request for termination. The California Supreme Court reversed, finding that the trust provision created a remainder in the settlor's heirs.¹⁷³ The court relied on Civil Code section 779, under which "the term 'heirs' is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate."¹⁷⁴ The court also inferred intent to create a remainder from the provision that the settlor's heirs were to be determined under the succession laws in existence at the time of the trust's creation: "[B]y a change in the laws of succession, conceivably it could happen that those who would be entitled to take under the trust instrument . . . would no one of them be an heir at law of Helen Gray at the time of her death."¹⁷⁵ The court concluded that because a remainder had been created in the settlor's heirs and they were

171. 171 Cal. 637, 154 P. 306 (1915), noted in Comment, *Trusts: Power to Revoke in Absence of an Express Power of Revocation*, 4 CALIF. L. REV. 354 (1916).

172. 171 Cal. at 639, 154 P. at 307.

173. *Id.* at 642, 154 P. at 309.

174. *Id.* at 648, 154 P. at 311 (quoting CAL. CIV. CODE § 779). Civil Code § 779 abolishes the Rule in Shelley's Case. CAL. CIV. CODE § 779 (West 1982). "The effect of the repeal of this arbitrary rule is to restore to courts of equity their right to construe this language . . . in accordance with its plain import and intent." *Gray*, 171 Cal. at 644, 154 P. at 309. The court's discussion of the Rule in Shelley's Case and its reliance on § 779 are somewhat inapposite because the limitation in the instant case was not technically within the scope of the rule. The Rule in Shelley's Case contemplates a remainder in the heirs of the grantee and not a limitation in favor of the heirs of the grantor, as was the case in *Gray*. Comment, *supra* note 171, at 355; see Scott, *Revoking a Trust: Recent Legislative Simplification*, 65 HARV. L. REV. 617, 619 (1952); Note, *Revocation of Trust by Consent of the Beneficiaries*, 36 IND. L.J. 76, 80-81, 83 n.43 (1960); Comment, *The Worthier Title Doctrine in California*, 1 STAN. L. REV. 774, 778 (1949); Case Note, *Real Property—Trusts—Doctrine of Worthier Title Applicable as a Rule of Construction to Allow Settlor to Terminate Trust Where Remainder Limited to His Heirs*, 22 S. CAL. L. REV. 497, 499 (1949). Furthermore, it is probable that Civil Code § 779 was intended to apply only to real property, and the trust in *Gray* consisted of both realty and personalty. See Comment, *supra*, at 778-79.

175. *Gray*, 171 Cal. at 640, 154 P. at 308.

not before the court, termination of the trust necessarily had to be denied.¹⁷⁶

The decision in *Gray* was followed in *Bixby v. Hotchkis*.¹⁷⁷ In *Hotchkis* the settlor had established an irrevocable trust with a twenty year duration. At the end of the twenty year period, the trustees were to distribute the trust property to the settlor if he was then living, and if not, to his "heirs at law in accordance with the laws of succession of the State of California then in effect."¹⁷⁸ Six years after the execution of the trust instrument, the settlor sought to terminate the trust, contending that he was the sole trust beneficiary. The trial court's decision denying termination was affirmed on appeal: "One who creates a voluntary trust is not the sole beneficiary if he manifests an intention to create a contingent interest in others, such as his heirs at law."¹⁷⁹ The appellate court concluded that such a contingent interest had been created.¹⁸⁰

Neither the *Gray* nor the *Hotchkis* court considered the possible application of the doctrine of worthier title.¹⁸¹ The doctrine figured prominently, however, in *Bixby v. California Trust Co.*,¹⁸² decided by the California Supreme Court in 1949. *Bixby* involved an irrevocable trust under which the income was to be paid to the settlor for life, and upon his death, the trust property was to be distributed to the settlor's "heirs at law in accordance with the laws of succession of the State of California then in effect."¹⁸³ The trial court denied the settlor's application for termination, apparently relying on *Gray* and *Hotchkis*. The California Supreme Court reversed, holding that the settlor was the sole beneficiary

176. *Id.* at 641-42, 154 P. at 308-09.

177. 58 Cal. App. 2d 445, 136 P.2d 597 (1943).

178. *Id.* at 449-50, 136 P.2d at 599.

179. *Id.* at 451-52, 136 P.2d at 600-01.

180. The court relied primarily on *Gray v. Union Trust Co.* in making this determination. *Id.* The court, however, did not discuss the possible distinction between *Gray* and the instant case. The heirs in *Gray* were to be determined under the intestacy laws in effect at the creation of the trust, whereas the heirs in *Hotchkis* were to be determined under the succession laws in effect at the time of termination. In both cases, however, the class of heirs taking under the terms of the trust could be different from those who would take at the settlor's death under the laws of intestate succession.

181. The doctrine of worthier title, simply stated, provides that a limitation in favor of the grantor's heirs creates a reversion in the grantor and no interest in the heirs. The court in *Bixby v. Hotchkis* did cite a comment in the Restatement of Trusts which contained a cross-reference to the section dealing with the worthier title doctrine, but the court did not directly mention the doctrine. *Hotchkis*, 58 Cal. App. 2d at 451-52, 136 P.2d at 600-01; see Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction*, 6 U.C.L.A. L. REV. 371, 391 (1959).

182. 33 Cal. 2d 495, 202 P.2d 1018 (1949).

183. *Id.* at 497, 202 P.2d at 1018.

of the trust and therefore could compel termination.¹⁸⁴ To achieve this result, the court resorted to the doctrine of worthier title,¹⁸⁵ which provides that a limitation in favor of the grantor's heirs creates a reversion in the grantor and no interest in his heirs.¹⁸⁶

Relying on the landmark opinion of Justice Cardozo in *Doctor v. Hughes*,¹⁸⁷ the court indicated that this rule should be regarded as a rule of construction and hence applicable unless a contrary intention of the settlor is manifested. Therefore, if a trust instrument directs that the income should be paid to the settlor for life, and on his death the principal is to be distributed to his heirs, no remainder interests are created. The settlor is the sole beneficiary, owning a reversionary interest in the trust corpus.¹⁸⁸ The court distinguished the earlier decisions in *Gray* and *Hotchkis* on the ground that in those cases, the settlor intended to create an interest in a special class of persons, and not simply, as in *Bixby*, to provide for succession by the general class of persons who would take at death under the intestacy laws.¹⁸⁹

184. *Id.* at 497-99, 202 P.2d at 1019-20.

185. *Id.* at 498, 202 P.2d at 1019.

186. The worthier title doctrine originally consisted of two separate branches, one applicable to devises and the other to inter vivos conveyances. Under the first, a devise to a person who was also the heir of the testator had no effect; the person took as the heir and not under the will. The second rule rendered a limitation in an inter vivos conveyance to the heirs of the grantor void. The purpose underlying both rules was the same: to maximize the feudal incidents of relief, wardship, and marriage. When the feudal system fell into obsolescence, both aspects of the doctrine were eventually abolished in England. L. SIMES, *THE LAW OF FUTURE INTERESTS* § 26, at 56-57 (2d ed. 1966); Verrall, *supra* note 181. The rule relating to wills never had much impact in the United States, but the inter vivos aspect of the doctrine gained wide acceptance, though more as a rule of construction than as a rule of law. *Id.*

187. 225 N.Y. 305, 122 N.E. 221 (1919). *Doctor v. Hughes* involved an irrevocable inter vivos trust in land with the income payable to the settlor and an express remainder in the settlor's heirs. The issue did not involve termination of the trust but whether the creditors of the remaindermen could reach any interest in the trust property. The court held that no remainder interest had been created. *Id.* at 309, 122 N.E. at 221. The court recognized that "[t]here may be times . . . when a reference to the heirs of the grantor will be regarded as the gift of a remainder, and will vest title in the heirs presumptive," but indicated that this was not one of those times. "[T]o transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed. Here there is no clear expression of such a purpose." *Id.* at 312, 122 N.E. at 222. The court concluded that this rule of construction most closely approximates the presumed interest of most settlors: "No one is heir to the living, and seldom do the living mean to forego the power of disposition during life by the direction that upon death there shall be a transfer to their heirs." *Id.* at 313, 122 N.E. at 223.

The constructional principle developed in *Doctor v. Hughes* is generally accepted and has been adopted by the Restatement of Trusts. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 127 comment b. Nevertheless, it has been the subject of much litigation. See 1 A. SCOTT, *supra* note 3, § 127.1, at 989-94 nn. 6-13.

188. *Bixby*, 33 Cal. 2d at 497, 202 P.2d at 1019.

189. *Id.* at 499, 202 P.2d at 1020.

The decision in *Bixby v. California Trust Co.* was met with mixed reviews,¹⁹⁰ and in 1959 the doctrine of worthier title was statutorily abolished.¹⁹¹ California Civil Code section 1073 currently provides in pertinent part:

The law of this State does not include (1) the common law rule of worthier title that a grantor cannot convey an interest to his own heirs or (2) a presumption or rule of interpretation that a grantor does not intend, by a grant to his own heirs or next of kin, to transfer an interest to them.¹⁹²

This statute precludes resort to construction to solve the question of terminating a trust when the settlor is the income beneficiary with a remainder in his heirs. Other possible solutions are explored below.¹⁹³

The Living Beneficiaries as Sole Beneficiaries

Even if all living beneficiaries are competent and consent, and there is no other bar to termination, the existence of unborn or unascertained beneficiaries may preclude an early termination of the trust. On occasion the living beneficiaries may seek to establish that they are the sole beneficiaries, despite an apparent contingent limitation in favor of unborn or unascertained persons.¹⁹⁴ The constructional problems in these cases are similar to those in the preceding section.

If a future interest under a trust is limited to the heirs of the income beneficiary, it is possible that the settlor intended to create an equitable fee interest in the named beneficiary.¹⁹⁵ Some courts have achieved this result by application of the Rule in *Shelley's Case*.¹⁹⁶ The California

190. Compare Comment, *supra* note 174 and Case Note, *supra* note 174 (supporting the decision) with Verrall, *supra* note 181, at 389-97, 400-02 (arguing for the abolition of the doctrine of worthier title).

191. Act of Apr. 17, 1959, ch. 122, § 1, 1959 Cal. Stat. 2005 (codified at CAL. CIV. CODE § 1073 (West 1982)); *id.* § 2, at 2006 (codified at CAL. PROB. CODE § 109 (West Supp. 1984)). Effective Jan. 1, 1985, Probate Code § 109 was replaced by Probate Code § 6145. Act of Sept. 15, 1983, ch. 842, § 55, 1983 West's Legis. Serv. 4497.

192. CAL. CIV. CODE § 1073 (West 1982).

193. See *infra* notes 212-63 & accompanying text.

194. Many of the cases in this area involve the question of whether those consenting to the termination in fact hold all the beneficial interests in the trust. Often the answer hinges on whether the gift of the remainder is phrased in such a way that under traditional rules of property the life tenant has a fee simple.

Wright, *supra* note 35, at 922.

195. "Remainder to the 'heirs' of the life tenant may give him a fee." *Id.* at n.32.

196. See, e.g., *Fowler v. Lanpher*, 193 Wash. 308, 75 P.2d 132 (1938). Under the Rule in *Shelley's Case*, if the beneficial interest under a trust of land is limited to a person for life and to his heirs in remainder, he receives an equitable interest in fee, his heirs having no interest. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 127 comment c. This obviates the necessity of obtaining the consent of those who would otherwise have interests as the "heirs" of the life beneficiary. 4 R. POWELL, *supra* note 7, ¶ 566, at 428.41 n.9. Some courts have gone

courts, however, have consistently rejected this argument,¹⁹⁷ relying primarily on Civil Code section 779 which abolishes the Rule in Shelley's Case and provides that

[w]hen a remainder is limited to the heirs . . . of a person to whom a life estate in the same property is given, the persons who, on termination of the life estate are the successors or heirs . . . of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.¹⁹⁸

Even when section 779 has no application, the courts have tended to view the term "heirs" as a word of purchase. For example, in *Estate of Leonardini v. Wells Fargo Bank & Union Trust Co.*,¹⁹⁹ the trust instrument provided that the income was to be paid to the settlor's god-daughter for her life, and on her death, the principal was to be paid to her son "Bradford E. Panish, or his heirs."²⁰⁰ Both the income beneficiary and the son desired and consented to a partial termination of the trust. The court indicated that the heirs of the son had a contingent remainder in the corpus, that they took by purchase and not descent, and that their consent was therefore indispensable.²⁰¹

When the class designation has been more specific, such as "issue," "descendants," or "children," the California courts uniformly have held that unborn or unascertained class members have a beneficial interest necessitating their consent for termination of the trust.²⁰² The courts have reached this result despite the improbability, if not impossibility, that such class members will ever come into existence. In *Fletcher v. Los Angeles Trust & Savings Bank*,²⁰³ the trust income was to be paid to the

even further, and have held "issue" to mean "heirs" for the purpose of applying the Rule in Shelley's case. See, e.g., *Mylin v. Hurst*, 259 Pa. 77, 102 A. 429 (1917); *Baxter v. Early*, 131 S.C. 374, 127 S.E. 607 (1925). On occasion, the designation "children" has been interpreted as "heirs" for the purposes of the rule. See, e.g., *Simpson v. Reed*, 205 Pa. 53, 54 A. 499 (1903). See generally Comment, *Revocation of an Inter-vivos Trust—Who Must Consent*, 2 WAYNE L. REV. 34, 36-37 (1955) (application of the Rule in Shelley's Case).

197. See, e.g., *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal. App. 2d 657, 665, 267 P.2d 423, 428 (1954) (holding that the heirs of the income beneficiary were a presently unascertainable group, having an interest in the corpus of the trust by purchase and not by descent).

198. CAL. CIV. CODE § 779 (West 1982).

199. 131 Cal. App. 2d 9, 280 P.2d 81 (1955).

200. *Id.* at 10, 280 P.2d at 83.

201. *Id.* at 15-17, 280 P.2d at 86-87.

202. See, e.g., *Estate of Madison*, 26 Cal. 2d 453, 159 P.2d 630 (1945); *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 187 P. 425 (1920); *Woestman v. Union Trust & Sav. Bank*, 50 Cal. App. 604, 195 P. 944 (1920).

203. 182 Cal. 177, 187 P. 425 (1920). For criticism of *Fletcher*, see Turrentine, *Suggestions for Revision of the California Civil Code Regarding Future Interests*, 21 CALIF. L. REV. 1, 26-28 (1932). See also Comment, *Property: Termination of a Trust: Meaning of Gift Over to*

settlor's daughter for life, and on her death, the trust fund was to be distributed in equal shares to her children. The income beneficiary had one child, and both desired termination of the trust. The parties claimed that because of the age and sterility of the income beneficiary, she could bear no more children, and that therefore she and her son represented the only possible beneficiaries under the trust. The trial court so found and rendered a decree terminating the trust.

The California Supreme Court reversed. The court noted that the case was outside the purview of the *Claflin* doctrine,²⁰⁴ and hence the only issue was whether all those holding beneficial interests in the trust were before the court.²⁰⁵ Determination of this issue was dependent on the admissibility of testimony as to the age and sterility of the income beneficiary. The court held such evidence inadmissible, relying on the conclusive presumption that a woman is capable of bearing children as long as she lives.²⁰⁶ Although this rule is of English common-law origin, the English courts have departed from it, and trusts have been terminated in England upon the presumption that a woman has ceased to have childbearing capacity.²⁰⁷ The California Supreme Court, however, felt constrained to follow the so-called American rule establishing a conclusive presumption of fertility.²⁰⁸ In support of its decision, the court stated: "We are the more ready to do this, as such an interpretation can wrong no one and the result of such a rule is merely to enforce the clearly expressed intention of the trustor, and is more in accord with the American law concerning trusts in personality."²⁰⁹

The *Fletcher* rule was followed in *Wogman v. Wells Fargo Bank & Union Trust Co.*²¹⁰ In *Wogman* the court stated that although the income beneficiary had only one child who consented to the termination, and was "nearly 58, so that the probability of having any more children is extremely remote . . . such a legal possibility exists."²¹¹

In summary, the problem of trust termination becomes particularly acute when the terms of the trust include provisions in favor of the heirs, issue, descendants, or children of a living person. The constructional

"Children": *Are Adopted Children Included?*, 7 CALIF. L. REV. 353 (1919) (discussing the since vacated Court of Appeal decision in *Fletcher*).

204. See *supra* notes 82-88 & accompanying text.

205. *Fletcher*, 182 Cal. at 179-80, 187 P. at 426.

206. *Id.* at 180-84, 187 P. at 426-28.

207. *Id.* at 182, 187 P. at 427.

208. *Id.* at 184-85, 187 P. at 428.

209. *Id.*

210. 123 Cal. App. 2d 657, 267 P.2d 423 (1954).

211. *Id.* at 665, 267 P.2d at 428-29.

preferences, coupled with the conclusive presumption of fertility, generally result in a determination that these unborn or unascertained persons have a sufficient beneficial interest requiring their consent for termination. The following section outlines some possible solutions to the unborn beneficiary problem.

Solutions to the Unborn Beneficiary Problem

In addition to the resurrection of the doctrine of worthier title and the Rule in Shelley's Case, various devices have been developed to mitigate the problems engendered by the presence of unborn beneficiaries. These include the doctrine of virtual representation, the appointment of a guardian ad litem, statutes limiting the consent requirement, and abrogation of the conclusive presumption of fertility.

Virtual Representation

Under the doctrine of virtual representation, the unborn members of a class of beneficiaries may be represented by the living members of the same class or by those having substantially similar interests so as to effectively protect the interests of the unborn. The theory underlying the doctrine rests on the similarity of economic interest between the unborn members and the living representatives. Courts assume that in pursuing his own self-interest, the representative will effectively safeguard the interests of those whom he represents.²¹² The doctrine has been used in at least one California case in the trust termination context.

In *Mabry v. Scott*,²¹³ the settlor established an irrevocable inter vivos trust, naming himself, his spouse, and their four minor children as income beneficiaries. On the death of the survivor of these six individuals, the principal was to go first to the living issue of the settlor's four children, or contingently, in the event of their death, to living spouses of the four children; in the event that no issue or spouses survived, the principal was to go to the heirs of the settlor. Shortly after establishing this trust, the settlor was divorced; he eventually remarried and had another child. He later brought suit to cancel the trust, alleging fraud and undue influence on the part of his former wife. This suit ultimately was settled by a compromise agreement, under which the settlor and his former wife

212. Rodman & Rodman, *Virtual Representation: Some Possible Extensions*, 6 REAL PROP. & PROB. & TR. L.J. 281 (1971); Note, *Trust Termination and Unborn Beneficiaries*, 29 OHIO ST. L.J. 741, 742 (1968).

213. 51 Cal. App. 2d 245, 124 P.2d 659 (1942).

would each receive \$60,000 from the trust corpus;²¹⁴ in addition, various modifications were made in the income payments. The trustee, however, objected to the settlement, contending that the unborn contingent remaindermen (the issue of the settlor's children) were indispensable parties whose rights were adversely affected.²¹⁵ The trial court found that the compromise was fair and equitable, and ordered modification of the trust. The compromise was upheld on appeal. The appellate court reasoned that "there was virtual representation of the unborn contingent remaindermen by the living children."²¹⁶ The court determined that there was no adverse interest between the living children and their issue which would prevent the living children from effectively protecting the rights of the unborn contingent remaindermen.²¹⁷ Furthermore, the unborn remaindermen and the living children were protected by the appointment of guardians ad litem.²¹⁸ The court concluded that the inability to bring unborn beneficiaries "before the tribunal" should not preclude the rights of the living from being adjudicated.²¹⁹

The *Mabry* case did not involve total termination of the trust, but merely a modification resulting in a partial termination. Furthermore, the modification was produced by a settlement of a case that could conceivably have resulted in cancellation of the trust, thereby eliminating the interests of all beneficiaries, including those of the unborn remaindermen. In this situation, the interests of the living and unborn beneficiaries were substantially similar. Frequently, however, when termination of a trust is sought, the interests of the living and the unborn beneficiaries are diametrically opposed.²²⁰ Thus, the doctrine of virtual representation is of limited utility in the trust termination context. The guardian ad litem device, although similar in concept to the representation doctrine, would

214. The trust fund as originally constituted had a value of \$1,350,000. *Id.* at 247, 124 P.2d at 660.

215. *Id.* at 251, 124 P.2d at 662.

216. *Id.* at 253, 124 P.2d at 663.

217. *Id.* at 255, 124 P.2d at 665. The absence of "hostility" between the interests of the representative and those of the unborn is a prerequisite to application of the virtual representation doctrine. 2A R. POWELL, *supra* note 7, § 296, at 581. Hostility exists when the grant of the relief requested would destroy the interests limited to the unborn person. *Id.* at 581-82.

218. *Mabry*, 51 Cal. App. 2d at 256, 124 P.2d at 665.

219. *Id.* at 252-53, 124 P.2d at 663.

220. "Where, then, the interest of the unborn is derived from the trust instrument the representation doctrine is inapplicable for one who might represent the unborn in many cases involving trusts would here be destroying the interest of those represented and not protecting it." Comment, *Revocation of "Irrevocable" Trusts*, 6 FORDHAM L. REV. 242, 253 (1937); see also 66 COLUM. L. REV. 1552, 1557-58 (1966) (suggesting that appointment of a guardian ad litem affords more substantial protection for the interests of the unborn than reliance upon representation by living beneficiaries).

seem to afford greater flexibility and also greater protection to those represented.

Appointment of a Guardian Ad Litem

The guardian ad litem concept involves the appointment by the court of a person to represent a party who is under a disability.²²¹ The use of the guardian ad litem in the trust termination context came to the fore in the celebrated case of *Hatch v. Riggs National Bank*,²²² when a federal court suggested the appointment of a guardian ad litem as an alternative to the doctrine of worthier title.

In *Hatch*, the settlor executed an irrevocable spendthrift trust, reserving to herself the income for life and directing that on her death the principal was to be paid pursuant to her appointment by will, or in default of appointment, to her next of kin under the District of Columbia intestacy laws then in effect. Thereafter, the settlor sought a partial termination of the trust,²²³ claiming that she was the sole beneficiary and therefore could revoke or modify the trust under accepted principles of trust law. The doctrine of worthier title was invoked to support this contention. The court of appeal rejected the settlor's arguments in this respect.²²⁴ The court noted the feudal origins of the doctrine, but recognized that the doctrine had won widespread acceptance as a rule of construction following Justice Cardozo's opinion in *Doctor v. Hughes*.²²⁵ The court also observed that while the weight of authority supported retention of the doctrine as a rule of construction, "there has been substantial and increasing opposition to the doctrine."²²⁶ The court concluded that retention of the doctrine was "pernicious in several respects."²²⁷

First, the court questioned whether the doctrine corresponded with the intent of the average settlor. Although the dominant purpose of the settlor may well be to benefit himself as the income beneficiary during his life, a subsidiary but still significant purpose may be the satisfaction of a natural desire to benefit his heirs or next of kin.²²⁸ In addition, the court

221. Note, *supra* note 212, at 744.

222. 361 F.2d 559 (D.C. Cir. 1966).

223. The settlor desired an additional \$5000 per year to be paid from the trust corpus in order "to accomodate recently incurred expenses, and to live more nearly in accordance with her refined but yet modest tastes." *Id.* at 561 (quoting Complaint).

224. *Id.*

225. 225 N.Y. 305, 122 N.E. 221 (1919).

226. *Hatch*, 361 F.2d at 563.

227. *Id.*

228. *Id.*

noted that although the presumption of a reversion is rebuttable by evidence of a contrary intent, interpretation of the often murky signals of such intent has resulted in "a shower of strained decisions difficult to reconcile with one another and generative of considerable confusion in the law."²²⁹ The court indicated its unwillingness "to plunge the District of Columbia into the ranks of those jurisdictions bogged in the morass of exploring, under the modern doctrine of worthier title, 'the almost ephemeral qualities which go to prove the necessary intent.'"²³⁰ In rejecting the worthier title doctrine, the court concluded that treating the settlor's heirs like any other remaindermen would effectuate the intent of most settlors and would lead to less litigation, greater predictability, and easier drafting.²³¹

The problem with treating the settlor's heirs "like any other remaindermen" is that their consent is necessary to a termination or a modification of the trust by the settlor. To alleviate this problem, the court in *Hatch* proposed the appointment of a guardian ad litem to represent the interests of the heirs for purposes of consent to modification or revocation.²³² The court noted that although the persons whose interests the guardian ad litem would represent are unascertainable as individuals, they are identifiable as a class and their interests are therefore recognizable.²³³ The court suggested that the settlor seeking to revoke or modify the trust "supplement his appeal to equity with a quid pro quo offered to the heirs for their consent."²³⁴ In the instant case, such consideration

229. *Id.* As an example of this confusion, the court pointed to the varying inferences that could be drawn from the settlor's reservation of a testamentary power of appointment which, if exercised, could defeat the interest of the heirs. The inclusion of such a power could be viewed as buttressing the presumption of a reversion by indicating that the settlor intended to retain control over the property. On the other hand, many courts have reasoned that the retention of a testamentary power of appointment confirms the intent to create a remainder in the heirs, because the settlor would not have retained the power unless he believed he was creating a remainder interest. *Id.* at 564.

The Restatement takes a middle ground on the issue:

If . . . he reserves power to appoint by will alone, and in default of appointment the property is to be conveyed to his heirs or next of kin, this is some indication that he intended to confer an interest upon his heirs or next of kin which they could be deprived of only by a testamentary appointment, but this is not of itself sufficient to overcome the inference that he intended to give them no such interest but intended to be the sole beneficiary of the trust.

RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 127 comment b.

230. *Hatch*, 361 F.2d at 564 (quoting *In re Burchell's Estate*, 299 N.Y. 351, 361, 87 N.E.2d 293, 297 (1949)).

231. *Hatch*, 361 F.2d at 564.

232. *Id.* at 565.

233. *Id.* at 566.

234. *Id.*

might consist of the removal of the testamentary power of appointment from the terms of the trust.²³⁵

Although the court in *Hatch* relied upon its inherent equitable power to appoint a guardian ad litem,²³⁶ several jurisdictions, including California, have enacted statutory authorization for such appointment.²³⁷ California Code of Civil Procedure section 373.5 provides that a class of unborn or unascertained persons having a legal or equitable interest in property may be conclusively represented by a guardian ad litem appointed by the court.²³⁸

The guardian ad litem device espoused in *Hatch* and authorized by statute in California should not be regarded as a total panacea for settlors and other living beneficiaries who desire early termination or modification of a trust. The guardian ad litem acts in a fiduciary capacity and must actively safeguard the interests of the represented class.²³⁹ "The representation by the guardian must be real and not merely formal."²⁴⁰ The guardian cannot simply consent to a trust termination or modification that adversely affects the interests of the unborn or unascertained class members. Some corresponding benefit to the class must be forthcoming.²⁴¹ In the absence of some such benefit, the consent by the guardian will be deemed ineffectual.²⁴²

The quid pro quo requirement is not necessarily an insurmountable hurdle. In cases where the settlor/beneficiary seeks only modification or partial termination, the requirement may be fairly easy to meet. In cases

235. *Id.* The settlor ultimately followed the suggestions of the court of appeal and secured the appointment of a guardian ad litem who consented to the proposed modification. The modification was subsequently approved by the district court. *Hatch v. Riggs Nat'l Bank*, 284 F. Supp. 396 (D.D.C. 1968).

236. *Hatch*, 361 F.2d at 565-66.

237. See, e.g., CAL. CIV. PROC. CODE § 373.5 (West 1973); ILL. REV. STAT. ch. 22, § 6 (1959); MD. ANN. CODE RULES OF COURT ch. 1100, Rule V79 (1984); MASS. GEN. LAWS ANN. ch. 203, § 17 (West 1958); MICH. COMP. LAWS ANN. § 27.3178(212) (1947). English law allows the court itself to consent on behalf of unborn beneficiaries to the termination or modification of a trust if the court determines that such action would be advantageous to the unborn beneficiaries. 6 & 7 Eliz. 2, ch. 53, § 1 (1958). See generally *Trusts: Revocation: Doctrine of Worthier Title vs. the Use of Guardians Ad Litem*, 41 CONN. B.J. 154, 160-63 (1967) (court appointment of guardians ad litem).

238. CAL. CIV. PROC. CODE § 373.5 (West 1973). This statute was enacted in 1949 as a partial codification of the virtual representation doctrine. *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal. App. 2d 657, 666, 267 P.2d 423, 429 (1954); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Trusts*, § 122, at 5481 (8th ed. 1974).

239. Note, *supra* note 212, at 744-45; 66 COLUM. L. REV. 1552, 1554, 1558 (1966).

240. *Estate of Leonardini v. Wells Fargo Bank & Union Trust Co.*, 131 Cal. App. 2d 9, 17, 280 P.2d 81, 87 (1955).

241. *Id.*; *Wogman*, 123 Cal. App. 2d at 666, 267 P.2d at 429.

242. *Leonardini*, 131 Cal. App. 2d at 17-18, 280 P.2d at 87-88.

such as *Hatch*, in which the settlor originally had retained a power of appointment, renunciation of the power probably would be sufficient. Other possibilities include the transfer of additional assets to the corpus or the agreement to leave additional property to the settlor's heirs.²⁴³ When total termination of the trust is sought, however, the problem becomes more difficult. Total termination necessarily entails the elimination of all beneficial interests, including those represented by the guardian. Whatever quid pro quo is given must be commensurate with the value of the estate the beneficiaries would have received in the absence of termination.²⁴⁴ If the settlor has placed the bulk of his assets in the trust he now seeks to terminate, the problem is acute, and termination is virtually impossible.²⁴⁵ If, however, the settlor has the good fortune to hold a testamentary power of appointment over the assets of another trust, he may be in luck. In *Moxley v. Title Insurance & Trust Co.*,²⁴⁶ Justice Traynor, in dissent, suggested that the beneficiary's exercise of a power of appointment over a trust fund established by her father in favor of the unborn beneficiaries under the trust established by her mother might be an adequate quid pro quo for the termination of the mother's trust. The value of the former trust fund apparently greatly exceeded the latter. The majority opinion, however, did not discuss this issue.

Another possible solution to the quid pro quo requirement would be to recognize nonpecuniary factors, such as familial devotion, as a substitute for consideration. Although the fiduciary responsibilities of guardianship generally would preclude such substitutes, at least one jurisdiction appears to authorize a nonpecuniary quid pro quo.²⁴⁷

Although the guardian ad litem concept has some drawbacks, particularly for those seeking termination, it has proved useful on occasion and should be retained as one mechanism for alleviating certain trust termination and modification situations. Because of its inherent limitations, however, consideration should be given to possible statutory modification of the beneficiary consent requirement, discussed in the next section.

243. 66 COLUM. L. REV. 1557, 1558-59 (1966); see 42 WASH. L. REV. 919, 921-22 (1967).

244. Note, *supra* note 212, at 748-49.

245. *Id.*

246. 27 Cal. 2d 457, 476-77, 165 P.2d 15, 25 (1946) (Traynor, J., dissenting).

247. Legislation in Wisconsin allows for the appointment of a guardian ad litem to represent unborn or unascertained beneficiaries and provides that "[a] guardian ad litem for such beneficiary may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a revocation, modification or termination of a trust or any part thereof." WIS. STAT. ANN. § 701.12(2) (West 1981).

Statutory Amendment of the Consent Requirement

As noted above, problems arise when the settlor has created an irrevocable trust, reserving an income interest in himself for life and directing that on his death the principal be distributed to his heirs or next of kin, and he later wishes to terminate this arrangement because of financial need or other reasons. California should statutorily reinstate a limited form of the worthier title doctrine to alleviate the problems engendered by this situation. Such legislation might simply restate the common-law rule that an irrevocable trust may be terminated upon the consent of the settlor and all beneficially interested persons, but should then provide that a gift or limitation in favor of the "heirs" or "next of kin" of the settlor does not create a beneficial interest.²⁴⁸ The rationale underlying this recommendation is that the settlor's primary purpose in establishing such a trust is to provide lifetime benefits to himself, thus "he probably did not intend his determination of the ultimate objects of his generosity to be final."²⁴⁹ There appears to be no public policy justification for not allowing the settlor to change his mind under these limited circumstances.²⁵⁰ Such legislation should apply only when the designation involves the term "heirs" or "next of kin;" it should not apply when the limitation is in favor of the children, issue, or descendants of the settlor.²⁵¹ Furthermore, the statute should not apply to a limitation in favor of the heirs or next of kin of someone other than the settlor.²⁵² In these latter situations, in which the class includes unborn or unascertained persons, the only mechanism for termination or modification

248. Similar legislation was enacted in New York in 1951 as a response to the volume of litigation spawned by *Doctor v. Hughes*. 1951 N.Y. Laws 729 (codified at N.Y. EST. POWER & TRUSTS LAW § 7-1.9 (McKinney 1981)). For a discussion of the revised New York statute, see Niles, *Trusts and Administration*, ANN. SUR. AM. LAW 570, 575-76 (1952); Scott, *supra* note 174, at 621-23; Verrall, *supra* note 181, at 386-87. Oklahoma has adopted a similar provision. OKLA. STAT. ANN. tit. 60, § 175.41 (West 1971).

249. Scott, *supra* note 174, at 623.

250. Such legislation should be limited to the case in which the settlor has provided that the trust income be paid to himself for life, and on his death, the principal is to be distributed to his heirs or next of kin. It is recommended, however, that the statute be applied whether or not the settlor has reserved a testamentary power of appointment. It should be noted that the proposed legislation may have tax consequences which should be explored before such a statute is adopted. See Johanson, *Reversions, Remainders, and the Doctrine of Worthier Title*, 45 TEX. L. REV. 1, 16-27 (1966).

251. The latter terms are more clearly indicative of an intent to make a gift to the described class of persons. See RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 127 comment b.

252. In this situation, the settlor is not manifesting any intent to retain control over the property himself, and the common inference (in the absence of the Rule in Shelley's Case) is that a class gift was intended. *Id.*

should be the appointment of a guardian ad litem or the doctrine of virtual representation.

Moreover, legislation should be enacted to alleviate the "fertile octogenarian" problem previously discussed.²⁵³ Under the existing California case law there is a conclusive presumption of fertility, that is, a woman is presumed capable of bearing children as long as she lives.²⁵⁴ The presumption originated in cases involving the rule against perpetuities, with the courts refusing to admit evidence of a woman's sterility to validate the interests otherwise too remote.²⁵⁵ The rationale proffered for the rule was that such evidence was too conjectural, too uncertain.²⁵⁶ Advances in medical science, however, have encouraged a number of jurisdictions to abandon the conclusive presumption and to allow expert medical testimony on the issue of fertility *vel non*.²⁵⁷ In the context of trust termination, most modern courts take the view that absent dispute about the possibility of bearing children, termination should be permitted.²⁵⁸ The only reasons given in support of retaining the conclusive presumption are the "indelicacy" or "indecentcy" of the proffered evidence; the inducement for sterilization for the purpose of terminating trusts that would exist without the rule; and the uncertainty of such evidence.²⁵⁹ The first reason is "absurdly prudish"²⁶⁰ and the second "utterly insubstantial."²⁶¹ As to the third, "the difficulty may be taken care of by a rule requiring that the proof of sterility, to be sufficient, must be clear and convincing."²⁶² Although the cases that have arisen in California have involved the alleged sterility of a female beneficiary, there is no reason why the proposed statute and its operation should not be "gender

253. See *supra* text accompanying notes 202-11.

254. *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 180-84, 187 P. 425, 426-28 (1920).

255. The seminal case is *Jee v. Audley*, 1 Cox 324 (1787), holding that a 70 year old woman was conclusively presumed capable of bearing children. The court's knowledge about these matters was derived primarily from the Old Testament. Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942, 942 (1962).

256. Turrentine, *supra* note 203, at 27 n.146.

257. See, e.g., *In re Bassett Estate*, 104 N.H. 504, 190 A.2d 415 (1963); see also RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 340 comment e; 4 A. SCOTT, *supra* note 3, § 340.1, at 2714.

258. 4 A. SCOTT, *supra* note 3, § 340.1, at 2714.

259. *Id.*; Turrentine, *supra* note 203, at 27 n.146.

260. 4 A. SCOTT, *supra* note 3, § 340.1, at 2714.

261. Turrentine, *supra* note 203, at 27. "The danger that a woman would submit to such an operation for such a reason [trust termination] is surely negligible . . ." 4 A. SCOTT, *supra* note 3, § 340.1, at 2714.

262. Turrentine, *supra* note 203, at 27. Moreover, even when the evidence of infertility is not conclusive, protection of possible unborn beneficiaries could be achieved by the use of a bond. 4 A. SCOTT, *supra* note 3, § 340.1, at 2714-15.

neutral."²⁶³

Conclusion

This Commentary has surveyed the existing California law in the area of trust revocation and termination, and has delineated particular problems that should be resolved or alleviated. Various proposals for reform have been suggested. These proposals may be summarized as follows:

1. Revision of California Civil Code section 2280 to limit the method of revocation by the settlor to the means specified in the trust instrument or to a writing delivered to the trustee during the settlor's lifetime.
2. Limitation of the material purpose doctrine to spendthrift trusts.
3. Adoption of a modified version of the worthier title doctrine to allow termination by the settlor despite a limitation in favor of his "heirs" or "next of kin."
4. Expansion of the utility of the guardian ad litem concept to allow nonpecuniary consideration for consent.
5. Abolition of the conclusive presumption of fertility.

The adoption of these proposals will provide greater flexibility to the creators and beneficiaries of trusts. Admittedly, these suggestions for reform are weighted in favor of living settlors and beneficiaries. Tipping the scales in favor of the living should be a conscious policy decision:

The reason . . . is a simple one of human relationships, implicit in the principle that human laws, and all other temporal things, are for the living; not for the dead or those not yet in being, if to hold otherwise would result in injustice to living persons. Because parties are not in being, and therefore cannot be brought before the tribunal, is not a sufficient reason for a court to stand by, helpless and impotent, when rights of living persons, in ordinary common sense, ought to be adjudicated.²⁶⁴

263. Courts in other jurisdictions have admitted evidence of male infertility. *See, e.g.*, *Scott Trust*, 8 Pa. D. & C.2d 66 (1955); *Krewson Trust*, 6 Pa. Fiduc. 54 (1955); *see also* 14 U. PITT. L. REV. 452, 454 (1953) (there should be no distinction between men and women concerning the incapacity of having issue).

264. *Mabry v. Scott*, 51 Cal. App. 2d 245, 252-53, 124 P.2d 659, 663 (1942).